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ABSTRACT

The purpose of this report is to determine how well the Federal Government has done its civil rights enforcement job, particularly in eliminating discrimination in housing, during the period from January 1975 through August 1978. Reported on are the Government's activities under the following laws: (1) Title VIII of the Civil Rights Act of 1968; (2) Title VI of the Civil Rights Act of 1964; (3) the Equal Credit Opportunity Act; (4) the Community Reinvestment Act; and (5) the Home Mortgage Disclosure Act. Also covered are the fair housing activities of the Department of Housing and Urban Development, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Federal Home Loan Bank Board, the General Services Administration, and the Veterans Administration. In addition, the fair housing enforcement efforts of the Departments of Justice, Defense, and Agriculture, as well as the fair housing roles of more than 50 other Federal agencies which can affect housing opportunities in connection with their program or regulatory operations are reported on. (Author/EB)

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APR 1 7 1979

THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT

A Report of the United States Commission on Civil Rights

ED169199

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C.
March 1979

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

SIRS:

The U.S. Commission on Civil Rights presents this report to you pursuant to Public Law 85-315, as amended.

This report is an assessment of the activities of Federal executive agencies to ensure fair housing. It reviews the efforts of the Departments of Housing and Urban Development and Justice, both of which have major responsibilities to combat housing discrimination. It also evaluates the activities of other agencies with programs or regulatory responsibilities that potentially affect equal housing opportunities. These agencies include the Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, the Veterans Administration, the Farmers Home Administration, the Department of Defense, and the General Services Administration.

The Commission has concluded that, while there have been some significant improvements in the Federal fair housing effort, for the most part this progress has been isolated and sporadic. Today, more than 10 years after the passage of Title VIII of the Civil Rights Act of 1968, there is no comprehensive or coordinated Federal strategy to secure fair housing.

This Commission finds that the Federal Government's fair housing enforcement effort suffers from three principal interrelated deficiencies:

- Title VIII of the Civil Rights Act of 1968, the primary fair housing law, is a weak law. Most significantly, although the Department of Housing and Urban Development (HUD) is charged with the overall administration of that law, HUD lacks enforcement power. HUD's Secretary is merely empowered to seek redress of Title VIII violations through conciliation.
- Those Federal agencies charged with ensuring equal housing opportunity have not adequately carried out this duty. Although Title VIII assigns HUD a leadership role in the implementation of that title, HUD has not been given the necessary assistance and has not been organized to exercise this role effectively.
- The Goverment's appropriations in support of fair housing have been inadequate.

In the final pages of this report, we have described our findings and conclusions in detail. We have also outlined three basic recommendations aimed at the elimination of the problems the report identifies. The first is that the President assist the Secretary of Housing and Urban Development in the discharge of Title VIII responsibilities by directing appropriate Federal departments and agencies to work with the Secretary in the enforcement of Title VIII. The second is that the President and the Congress take action to amend Title VIII to grant the Secretary of HUD the authority to issue cease and desist orders and the authority to order remedial steps necessary for the effectuation of Title VIII. The third is that the President and the Congress take appropriate steps to ensure that HUD's budget is sufficient for a vigorous enforcement drive to combat housing discrimination.

HUD programs are directed toward the national goal, as articulated in the Housing Act of 1949, of "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family." The Commission believes that its recommendations for improving HUD's fair housing effort would facilitate that goal by expanding housing opportunities for those people who have been and continue to be denied a decent home and a suitable living environment because of unlawful discrimination.

We urge your consideration of the facts presented and ask for your leadership in ensuring implementation of the recommendations made.

Respectfully,

Arthur S. Flemming, *Chairman*
Stephen Horn, *Vice Chairman*
Frankie M. Freeman
Manuel Ruiz, Jr.
Murray Saltzman
Louis Nuñez, *Acting Staff Director*

Preface

This report evaluates the Federal effort to end discrimination in housing. It covers the period from January 1975 through August 1978 and is a sequel to an earlier Commission report on the same subject— *To Provide. . .For Fair Housing,* volume II of of *The Federal Civil Rights Enforcement Effort,* published in December 1974. Both this report and *To Provide. . .For Fair Housing* are a part of a series of reports introduced by the Commission in October 1970 when it published its first across-the-board analysis of the Government's effort to end discrimination against minorities and women. This is the 13th report the Commission has issued on some aspect of the Federal effort to enforce civil rights requirements.

This report grew out of a request from the Office of Management and Budget for assistance to President Jimmy Carter's Reorganization Project. As part of his effort to establish an effective organization for the executive branch, President Carter created a Task Force on Civil Rights Reorganization. In October 1977, Howard Glickstein, Director of the Task Force, wrote to Commission Chairman Arthur S. Flemming requesting that the Commission provide the Task Force with an up-to-date report on the status of Federal activities to assure equal housing opportunity. The Commission, which in *To Provide. . .For Fair Housing* had observed the need for improvement in the fair housing efforts of the executive branch, agreed.

Although this report is a sequel to *To Provide. . .For Fair Housing,* it is considerably more extensive. At the time the earlier report was written, the principal laws available to the Government for securing fair housing were Title VIII of the Civil Rights Act of 1968, Title VI of the Civil Rights Act of 1964, and Executive Orders No. 11,063 and 11,512. Since that time, the coverage of Title VIII has been broadened to include a prohibition against sex discrimination in housing as well as the original prohibitions against race, national origin, and religious discrimination. The Equal Credit Opportunity Act, the Community Reinvestment Act, and the Home Mortgage Disclosure Act have been added to the Government's arsenal for combating housing discrimination. This report covers the Government's activities under all of those laws.

This report covers the fair housing activities of each of the agencies originally assessed in *To Provide. . .For Fair Housing:* the Department of Housing and Urban Development, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Federal Home Loan Bank Board, the General Services Administration, and the Veterans Administration. In an effort to be as comprehensive as possible, this 1979 report also covers the fair housing enforcement efforts of the Departments of Justice, Defense, and Agriculture, as well as the fair housing roles of more than 50 other Federal agencies which can affect housing opportunities in connection with their program or regulatory operations.

The methodology for this report was similar to that used by the Commission for other reports in the enforcement effort series. In late 1977, copies of the original chapters in *To Provide. . .For Fair Housing,* along with that report's findings and recommendations, were sent to the appropriate Federal agencies, with a request for information on any changes that had occurred since those chapters were written.

Detailed questionnaires were also sent to most other Federal departments and agencies concerning their activities and programs related to or affecting fair housing. Extensive interviews were held with Washington-based Federal civil rights officials, and a vast number of documents and data were analyzed, including laws, regulations, agency handbooks and guidelines, reports of complaint investigations and compliance reviews, and books and reports by leading civil rights experts. Interviews were also conducted with individuals who are knowledgeable in the area of equal housing opportunity, including representatives of civil rights organizations.

To assure the accuracy of this report, the Commission forwarded copies of its draft to all departments and agencies whose activities are discussed in detail for their comments and suggestions. Their responses have been very helpful, serving to correct factual inaccuracies, clarifying points that may not have been sufficiently clear, and providing further updated information on activities undertaken subsequent to Commission staff investigations. These comments have been incorporated in the report. In cases where agencies disagreed with Commission interpretations of fact or with the views of the Commission on the desirability of particular enforcement or compliance activities, their points of view, as well as that of the Commission, have been noted. In their comments, agencies sometimes provided new information not made available to Commission staff during the course of its interviews and investigations. Sometimes the information was inconsistent with the information provided earlier. Although it was not always possible to evaluate this new information fully or to reconcile it with what was provided earlier, in the interest of assuring that agency compliance and enforcement activities are reported as comprehensively as possible, the new material has been noted in the report.

In the course of preparing this report, Commission staff interviewed numerous Federal workers in the field of equal housing opportunity and made a large number of demands upon Federal agencies for data and documents. The assistance received was generally excellent. Without it, the Commission would not have been able to publish its views at this time. The Commission further would like to note that many of the Federal employees assigned to duties and responsibilities within the equal housing opportunity area should be commended for what they have done, considering the legal and policy limitations within which they have been working.

This report does not deal primarily with the substantive effect of civil rights laws. The Commission does not attempt here to measure precise gains made by minority group members and women as a result of civil rights actions of the Federal Government. This has been and will continue to be the subject of other Commission studies. Rather, the attempt here is to determine how well the Federal Government has done its civil rights enforcement job—to evaluate for the period between January 1975 and August 1978 the activities of a number of Federal agencies with important civil rights responsibilities.

The purpose of this series of reports is to evaluate how well the Federal Government has accomplished its civil rights enforcement mission and to offer recommendations for the improvement of those programs which require change. Commission efforts in this regard will not end with these reports. The Commission will continue to monitor Federal enforcement activities designed to end discrimination until such efforts are totally satisfactory.

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THE MANDATE FOR FAIR HOUSING

Title VIII of the Civil Rights Act of 1968

Title VIII of the Civil Rights Act of 1968,[1] also referred to as the "Fair Housing Act," prohibits discrimination based on race, color, religion, sex, and national origin in the sale or rental of most housing.[2] It covers activities of all segments of the real estate industry, including real estate brokers, builders, apartment owners, sellers, and mortgage lenders, and extends as well to federally-owned and -operated dwellings and dwellings provided by federally-insured loans and grants. Title VIII prohibits a wide variety of discriminatory activities on the basis of race, color, religion, sex, or national origin. This prohibited activities include:

- Refusal to sell or rent a dwelling.[3]
- Discrimination in the terms, conditions, or privileges of the sale or rental of a dwelling.[4]
- Indicating a preference, limitation, or discrimination in advertising.[5]
- Representation to a person or persons that a dwelling is unavailable.[6]
- Denial of a loan for purchasing, constructing, improving, or repairing a dwelling.[7]
- Discrimination in setting the amount or other conditions of a real estate loan.[8]
- Denial of access to or membership in any multiple-listing service or real estate brokers' organization.[9]

Title VIII also prohibits such forms of discrimination as "blockbusting"—convincing owners to sell property on the grounds that minorities are about to move into a neighborhood—and "steering"—the process of directing a racial, ethnic, or religious group into a neighborhood in which members of the same group already live.[10]

The act also provides that it is unlawful for any bank, building and loan association, or other institution engaged in making real estate loans, to deny a loan or other financial assistance for purchasing, constructing, repairing, or maintaining a dwelling or to discriminate against borrowers in fixing the amount, interest rate, duration, or other terms or conditions of such a loan because of an applicant's race, color, religion, national origin, or sex.[11]

Responsibility for overall administration of Title VIII rests with the Department of Housing and Urban Development, which has authority to investigate and conciliate complaints of housing discrimination.[12] However, the Department of Justice is the only unit of the executive branch that Congress has assigned enforcement authority under Title VIII.[13] Section 813 gives the Attorney General the authority to litigate when there is a pattern or practice of

[1] 42 U.S.C. § 3601–19, 3631 (1970 and Supp. V 1975).

[2] Exempted from Title VIII are: single-family homes sold or rented without the use of a broker and without discriminatory advertising; rooms or units in dwellings with living quarters for no more than four families, provided that the owner lives in one of them and does not advertise or use a broker. 42 U.S.C. § 3603(b) (1970). In addition, religious organizations and affiliated associations are free to give preference in selling or leasing housing to persons of the same religion, provided that the property is not owned or operated for a commercial purpose and provided that the religion itself does not restrict membership on account of race, color, sex, or national origin. Private clubs and religious organizations which are not open to the public and which incidentally operate noncommercial housing may limit occupancy of the housing to their members. (42 U.S.C. § 3607) (1970).

[3] 42 U.S.C. § 3604(a) (Supp. V 1975).

[4] 42 U.S.C. § 3604(b) (Supp. V 1975).

[5] 42 U.S.C. § 3604(c) (Supp. V 1975).

[6] 42 U.S.C. § 3604(d) (Supp. V 1975).

[7] 42 U.S.C. § 3605 (Supp. V 1975).

[8] *Id.*

[9] 42 U.S.C. § 3606 (Supp. V 1975).

[10] 42 U.S.C. § 3604(e) (Supp. V 1975).

[11] 42 U.S.C. § 3605 (Supp. V 1975).

[12] 42 U.S.C. § 3608(c) and (b) (1970).

[13] 42 U.S.C. § 3613 (1970).

housing discrimination or where issues of housing discrimination are of general public importance. In addition, Section 808(d) requires all executive departments and agencies to administer "their programs and activities relating to housing and urban development in a manner affirmatively to further the purpose of this title," and with "cooperating with the Secretary to further such purposes."[14] As discussed in the various chapters of this report, Section 808(d) provides the basis for the fair housing programs of a number of Federal agencies, including the Federal Home Loan Bank Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Farmers Home Administration of the Department of Agriculture, the Veterans Administration, and the General Services Administration.

The Equal Credit Opportunity Act

Another major piece of legislation mandating fair housing is the Equal Credit Opportunity Act (ECOA).[15] This 1974 act, as amended in 1976, makes it unlawful for creditors to discriminate against any applicant with respect to any aspect of a credit transaction, including any mortgage transaction, on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), or because all or part of the applicant's income derives from any public assistance programs.[16] With regard to discrimination in mortgage finance on the basis of race, religion, sex, or national origin, ECOA covers many of the same violations which are covered by Title VIII. Indeed, in order to guard against duplicate actions under the two laws, ECOA provides that:

> No person aggrieved by a violation of this title and by a violation of Section 805 of the Civil Rights Act of 1968 shall recover under this title and Section 812 of the Civil Rights Act of 1968, if such violation is based on the same transaction.[17]

ECOA is enforced by a number of Federal agencies,[18] each with the authority to make rules with respect to its own compliance procedures.[19] Overall responsibility for prescribing regulations to carry out the purpose of ECOA is assigned to the Federal Reserve Board.[20] The Attorney General is authorized to receive referrals for civil actions from agencies with ECOA enforcement duties and also independently to initiate a civil action when there is reason to believe that creditors are in violation of ECOA.[21]

Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 prohibits discrimination in any program or activity receiving Federal financial assistance.[22] It states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[23] In some instances, Title VI prohibits housing discrimination. For example, when local governments use Federal financial assistance to operate low-income housing, they are prohibited by Title VI from practicing discrimination on the basis of race, color, or national origin in renting that housing.[24] In addition, where benefits of federally-assisted programs accrue primarily to residents of a certain area, State and local governments may not limit access of minorities to those benefits by restricting their housing opportunities.[25] Title VI does place programs of insurance and

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[14] 42 U.S.C. § 3608(c) (1970).

[15] 15 U.S.C. § 1691–1691f (1976).

[16] 15 U.S.C. § 1691a(1) and (2) (1976). As it was originally passed in 1974, ECOA prohibited credit discrimination based on sex or marital status. The 1976 amendment added race, color, religion, national origin, age, and receipt of public assistance as prohibited bases of discrimination.

[17] 15 U.S.C. § 1691e(i) (1976). There are, however, many differences in the enforcement provisions of the two laws, such as the times for filing complaints and commencing civil action.

[18] The Federal entities that have specific enforcement responsibility under § 1691c (1976) are: the Comptroller of the Currency, Department of the Treasury; the Board of Governors of the Federal Reserve System; the Board of Directors of the Federal Deposit Insurance Corporation; the Federal Home Loan Bank Board; the National Credit Union Administration; the Interstate Commerce Commission; the Civil Aeronautics Board; the Secretary of Agriculture; the Farm Credit Administration; the Securities and Exchange Commission; and the Small Business Administration. In addition, the Federal Trade Commission is responsible for enforcing ECOA requirements which are not specifically assigned to these agencies. 15 U.S.C. § 1691c(c) (1976).

[19] 15 U.S.C. § 1691c(d) (1976).

[20] 15 U.S.C. §§ 1691e(g),(h) (1976).

[21] 15 U.S.C. § 1691e (1976).

[22] 42 U.S.C. §§ 2000d–2000d-6 (1970).

[23] *Id.*

[24] See the chapter in this report on the Department of Housing and Urban Development for a discussion of HUD efforts under Title VI to ensure equal opportunity in federally-assisted public housing.

[25] For example, this Commission has observed that the Environmental Protection Agency has a responsibility under Title VI to ensure that conditions such as the lack of fair housing laws, absence of a fair housing agency, or the existence of exclusionary zoning ordinances do not contribute to the exclusion of minorities from the benefits of Federal

guaranty outside its parameters,[26] however, and thus does not cover the loan guaranty program of the Veterans Administration or the insurance programs of the Departments of Housing and Urban Development and Agriculture.[27]

Responsibility for enforcing Title VI rests with the Federal agencies that provide assistance to recipients. Title VI provides that compliance may be effected by the termination of assistance or by "any other means authorized by law."[28] This phrase has been construed by the Attorney General to include a referral to the Attorney General for the initiation of litigation.[29] Unlike Title VIII or ECOA, Title VI does not provide the Attorney General with an independent authority to initiate civil action without a referral from another Federal agency.

Section 109 of the Housing and Community Development Act of 1974

Section 109[30] prohibits discrimination in programs and activities funded under Title I of the act establishing the community development block grant program administered by the Department of Housing and Urban Development. Section 109 states that, "No person in the United States shall on the grounds of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter."[31]

Although this wording is similar to the prohibition against discrimination in Title VI of the Civil Rights Act of 1964, the two prohibitions differ in a number of respects. Most significantly, Section 109, unlike Title VI, prohibits sex discrimination. Further, Section 109 covers assistance under the community development block grant program only, while Title VI extends not only to HUD's block grant program, but also to all other federally-funded programs.

Securing compliance under Section 109 is the responsibility of the Secretary of Housing and Urban Development. If a recipient is found in noncompliance, the Secretary may terminate, reduce, or limit the availability of payments or refer the matter to the Department of Justice for civil action.[32]

Executive Order 11,063

Executive Order 11,063 was issued on November 20, 1962. It prohibits discrimination based upon race, color, creed, or national origin with respect to the sale, leasing, rental, or other disposition of residential property and related facilities if the property or facility is: (a) owned or operated by the Federal Government; (b) provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government; (c) provided, in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government; or (d) provided by the development or redevelopment of real property purchased, leased, or otherwise obtained from a State or local agency receiving Federal assistance with respect to such real property.[33] The Executive order also prohibits discrimination by lending institutions when such practices relate to loans insured or guaranteed by the Federal Government.

The scope of the order, which covered less than 1 percent of the Nation's housing, has been correctly viewed as extremely narrow,[34] since most of the Nation's housing is financed through loans made by private lending institutions not covered by the order.[35] Moreover, this Executive order does not include any prohibition against discrimination based on sex.

The enforcement responsibilities under this order are dispersed throughout all departments and agencies in the executive branch of the Federal Government.[36] The Attorney General is given express power to bring civil or criminal action as appropriate[37] upon referral from the various executive departments and agencies.

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assistance for sewage treatment. U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. VI, *To Extend Federal Financial Assistance* (1976), pp. 597–98.

[26] 42 U.S.C. § 2000d–4 (1970) provides:

> Nothing in this [title] shall add to or detract from any existing authority with respect to any program under which federal financial assistance is extended by way of a contract of insurance or guaranty.

[27] For further information on prohibition against housing discrimination in programs of insurance guaranty operated by these agencies, see the chapters on these agencies in this report.

[28] 42 U.S.C. § 2000d–1 (1970).

[29] See the Attorney General's "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," 28 C.F.R. § 50.3 (1977).

[30] 42 U.S.C. §§ 5301–5317 (Supp. V 1975).

[31] 42 U.S.C. § 5309 (Supp. V 1975).

[32] 42 U.S.C. § 5311 (Supp. V 1975).

[33] Exec. Order No. 11,063, 3 C.F.R. 652 (1959–63 Compilation).

[34] Comment, The Federal Fair Housing Requirements, Title VIII of the 1968 Civil Rights Act, 1969 Duke L. J. 733.

[35] U.S., Commission on Civil Rights, *Understanding Fair Housing* (1973), p. 6.

[36] Exec. Order No. 11,063, § 101, 3 C.F.R. 652, 653 (1959–63 Compilation).

[37] Exec. Order No. 11,063, § 303, 3 C.F.R. 652, 655 (1959–63 Compilation).

Section 1982 of the Civil Rights Act of 1866

The United States Supreme Court, in the landmark case of *Jones* v. *Alfred H. Mayer Co.*,[38] interpreted Section 1982 of the Civil Rights Act of 1866[39] to be a valid exercise of congressional power to eliminate "badges and incidents of slavery [including] all racial discrimination in private as well as public housing."[40] Section 1982 declares:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.[41]

Jones was decided 2 months after the passage of Title VIII of the Civil Rights Act of 1968, and the decision considered some of the differences in the coverages of Section 1982 and Title VIII. In the Supreme Court's opinion, the enactment of Title VIII was not intended to and did not "effect any change, either substantive or procedural, in the prior statute," and the Court concluded that the two statutes are independent of one another.[42]

Unlike Title VIII, Section 1982 was created as private right of action and, therefore, does not assign duties to any Federal agency. Moreover, unlike Title VIII, it does not apply to housing discrimination based upon religion, sex, or national origin, does not charge any Federal agency with enforcing the law, and does not specifically mention the kinds of discriminatory activities prohibited.

Other Authorities

There are a number of other Federal authorities for fair housing discussed in this report. Most significant are those of the Federal financial regulatory agencies, which cover both the Home Mortgage Disclosure Act[43] and the Community Reinvestment Act[44] and the General Services Administration which covers Executive Order 11,512.[45]

[38] 392 U.S. 409, 416–17 (1968).
[39] 12 U.S.C. §§ 2801–2809 (1976).
[40] 12 U.S.C. §§ 2901–2905 (West Supp. 1978).
[41] Exec. Order No. 11,512, 3 C.F.R. 898 (1966–1970 Compilation).

[38] 42 U.S.C. § 1982 (1970).
[39] 392 U.S. 409 (1968).
[40] 392 U.S. 409, 410 (1968).
[41] 42 U.S.C. § 1982 (1970).

Chapter 1

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Summary

The Department of Housing and Urban Development (HUD) is charged with the overall administration of Title VIII of the Civil Rights Act of 1968, which prohibits housing discrimination on the basis of race, national origin, religion, and sex, and is also given the responsibility to investigate complaints of discrimination under that title. HUD, however, has not forcefully carried out these responsibilities.

- HUD has failed to issue Title VIII regulations which sufficiently describe what constitutes prohibited housing discrimination by lenders, real estate brokers, appraisers, local governments, and other entities or organizations which affect the supply and availability of housing.
- HUD's program for securing the voluntary compliance of the real estate industry with Title VIII has not been effective in facilitating fair housing since voluntary agreements often contain commitments to do less than the law requires. In addition, HUD has not regularly monitored compliance with these agreements.
- In the past few years, HUD conducted only one communitywide pattern and practice investigation, although in 1974 this Commission noted that conducting 50 such reviews in the next year was essential for meaningful Title VIII implementation.
- HUD's delays in complaint processing and its failure to use "testing" have curtailed the Department's ability to corroborate complainants' allegations of discrimination.

HUD's lack of enforcement power under Title VIII has been a major stumbling block to the protection of rights under that title. When HUD finds discrimination and attempts to conciliate a resolution, the Department is successful only about half the time. If respondents do not agree to HUD's proposals in conciliation, the probability of further action is low; only 10 percent of the cases HUD cannot conciliate are referred to the Department of Justice (DOJ) and few of those cases are pursued.

Under Title VIII of the Civil Rights Act of 1968, Section 109 of the Housing and Community Development Act of 1974, Executive Order No. 11,063, and Title VI of the Civil Rights Act of 1964, HUD is also responsible for ensuring equal housing opportunity in the assistance programs it operates. However, HUD has not been forceful in ensuring compliance with these requirements by its program participants:

- HUD has established equal opportunity requirements, such as affirmative marketing plans, equal opportunity housing plans, and broker certifications, for many of its program participants, but it has not regularly monitored compliance with these requirements.
- HUD has conducted too few compliance reviews of recipients of HUD assistance. In fiscal year 1977, 21 percent of all compliance reviews of recipients focused on private sponsors and owners, representing less than 1 percent of these participants in HUD programs. Fifty-six percent of HUD's compliance reviews focused on local public housing authorities, representing only 3 percent of these participants.
- HUD has not required prompt correction of noncompliance discovered through compliance reviews. It has been unwilling to terminate grant recipients upon a finding of civil rights violations but instead has typically continued to carry out protracted negotiations beyond the 60-day limitation provided for in Departmental regulations.

Since April 1977 HUD has issued policy statements and regulations which reveal an intent to administer the community block grant program to the increased benefit of low- and moderate-income persons. Although HUD's actions are to the benefit of minority and female-headed households, who are disproportionately represented among low- and moderate-income persons, HUD's overall administration of the block grant program has not adequately protected minority and female rights.

- Monitoring of block grant requirements, including civil rights requirements, has been inadequate. Recently revised regulations dictate that only communities which plan to use less than 75 percent of their block grant funds to benefit low- and moderate-income persons will be subjected to substantive preaward reviews.
- HUD's regulations do not require communities to undertake specific actions to address the special housing and community development needs of minority and female-headed households.
- As of the fourth year of the program, HUD has never disapproved a community's application because of civil rights violations, but instead has allowed such violations to continue uncorrected.

HUD's staffing patterns, budget allocations, and organizational structure reflect the low priority which has been accorded to HUD's administration of Title VIII. In fiscal year 1978, HUD will have used little more than 70 staff years for Title VIII duties in the regions, where most HUD Title VIII compliance activities take place, and will have allocated only $5.8 million for Title VIII activities in all HUD offices. These resources have not been adequate for HUD to carry out such activities as communitywide pattern and practice reviews and a comprehensive program of leadership and guidance for other Federal agencies with Title VIII responsibilities.

Although Title VIII authorized HUD to create an Assistant Secretary position, HUD has not used this position principally for Title VIII administration but, rather, has given its Assistant Secretary for Fair Housing and Equal Opportunity myriad other duties, including enforcement of Title VI of the Civil Rights Act of 1964, contract compliance, and HUD internal equal employment. Moreover, it is the HUD regional administrators and not the Assistant Secretary who have direct authority over HUD Title VIII or other fair housing activities in the regional offices and thus, the recommendations of equal opportunity staff on fair housing enforcement are not binding on field staff.

I. Program and Civil Rights Responsibilities

A. Program Responsibilities

The Department of Housing and Urban Development is the major Federal agency responsible for improving housing conditions in this country. It does so by providing assistance to citizens, developers, public housing authorities, and private nonprofit housing agencies for the financing and production of new housing, preservation of available housing, leasing of housing, and improvement of substandard housing. HUD also bears the primary responsibility for Federal efforts in the development of the Nation's communities.[1]

HUD's most significant programs, which are described in the following pages, include: the community development block grant program, the urban development action grant program, the comprehensive planning assistance program, the lower income rental assistance program, the low-income public housing program, the mortgage interest subsidy program, and mortgage insurance programs.[2]

1. Community Development Block Grant Program

Title I of the Housing and Community Development Act of 1974[3] established the community development block grant (CDBG) program. Under this program, cities with populations over 50,000

[1] U.S., Department of Housing and Urban Development, Office of the Secretary, *Summary of the HUD Budget, Fiscal Year 1979* (January 1978) (hereafter cited as *Summary of the HUD Budget, Fiscal Year 1979*). HUD's 1979 budget is a decrease of about $800 million from fiscal year 1977.

[2] HUD notes that, in addition,

> [T]he Section 312 rehabilitation loan program. . .has provided opportunities for thousands of low- and moderate-income families to remain as homeowners through the provision of direct Federal loans at 3% interest to finance rehabilitation in urban renewal and code enforcement areas selected by the local government. By financing rehabilitation to bring the property up to applicable code requirements, the loans prevent unnecessary demolition of basically sound structures. Henry A. Hubschman, Executive Assistant to the Secretary, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 17, 1978 (hereafter cited as Hubschman letter).

[3] Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. § 5300-5317 (Supp. V 1975)).

and urban counties—i.e., "entitlement communities"[4]—are automatically entitled to receive HUD assistance[5] provided that certain requirements are met.[6]

The primary objective of Title I is the development of viable communities by providing decent housing and a suitable living environment and expanding economic opportunities principally for persons of low and moderate income.[7] Consistent with this objective, Federal assistance provided under the block grant program must generally be used for:

- The elimination of slums and blight and the prevention of blighting influences;
- The elimination of conditions detrimental to health, safety, and public welfare;
- The conservation and expansion of the Nation's housing stock, principally for the benefit of low- and moderate-income persons;
- The reduction of the isolation of income groups within communities and geographical areas and promotion of diverse neighborhoods via the spatial deconcentration of housing opportunities for low- and moderate-income persons;
- The expansion and improvement of the quantity and quality of community services, principally for persons of low and moderate income, which are essential for sound community development and for the development of viable urban communities;
- A more rational utilization of land and other natural resources and the better arrangement of residential, commercial, industrial, recreational, and other needed activity centers;
- The restoration and preservation of properties of special value for historic, architectural, or esthetic reasons; and
- The alleviation of physical and economic distress through the stimulation of private investment and community revitalization in areas with population outmigration or a stagnating or declining tax base.[8]

Specific activities eligible for funding under Title I include demolition and rehabilitation, temporary relocation assistance, acquisition of real property, code enforcement, and public facilities improvement. Also eligible are the administrative costs of planning and executing community development and housing activities.[9] In fiscal year 1977, 1,343 metropolitan cities and urban counties received $2.8 billion in block grant funds.[10] HUD observed that "over 3-1/2 million dollars of FY 1977 CDBG funds was spent for fair housing activities. Of that, over $2 million went to fair housing groups for fair housing counseling, testing, and litigation."[11]

2. *Urban Development Action Grant Program*

The urban development action grant (UDAG) program was created by a 1977 amendment to the Housing and Community Development Act of 1974.[12] For fiscal year 1978, $400 million has been budgeted for this program.[13] Its purpose is to combat the problems of physical and economic deterioration through reclamation of neighborhoods having excessive housing abandonment or deterioration, and through community revitalization in areas with population outmigration or a stagnating or declining tax base. Grants made are for the benefit only of severely distressed cities and urban counties. Such localities are eligible for assistance if they have demonstrated results in providing low- and moderate-income housing and are providing equal opportunity in housing and employment for low- and moderate-income persons and members of minority groups.[14]

Final UDAG regulations, issued in January 1978, state that HUD will consider the following factors in determining if a community has achieved "reason-

[4] Under the block grant program, a county qualifies as an "urban county" if it (1) is in a metropolitan area, (2) is authorized under the State law to undertake essential community development and housing assistance activities in its unincorporated areas, and (3) has a combined population of 200,000 or more, excluding the population of central cities within the county. 24 C.F.R. § 570.105(b) (1977).

[5] 42 U.S.C. § 5306 (Supp. V 1975). Other localities are eligible for discretionary grants, subject to determination by the Secretary of HUD. In fiscal year 1977, 1,621 discretionary localities received block grant funds.

[6] The grounds for disapproving entitlements are discussed below.

[7] 42 U.S.C. § 5301(c) (Supp. V 1975).

[8] *Id.*

[9] 42 U.S.C. § 5305(a) (Supp. V 1975).

[10] U.S., Department of Housing and Urban Development, Office of Community Planning and Development, *Community Development Block Grant Program, Third Annual Report* (March 1978). In comparison, in fiscal year 1973 about 1,400 communities received $1.8 billion in community development funds under the following seven programs which have been replaced by the block grant program: urban renewal, model cities, neighborhood facilities, open space land, water and sewer facilities program, public facilities loans, and rehabilitation loans. HUD commented:

> In implementing the affirmative action requirements of Title VI, the Department has, since 1969, undertaken a front-end review of all grants under its community development programs to determine whether the location and design will provide service on a non-discriminatory basis. Hubechman letter.

[11] Hubechman letter.

[12] 42 U.S.C. § 5305(a) (Supp. V 1975). Housing and Community Development Act of 1977, Pub. L. No. 95-128, 91 Stat. 1125 (codified at U.S.C.A. § 5318 (West Supp. 1977)).

[13] *Summary of the HUD Budget, FY 1979.*

[14] 42 U.S.C.A. § 5318(b) (1977).

able results" in providing equal opportunity in housing:

- The extent to which federally (or other)-assisted housing units promote the geographic dispersal of minority families outside areas of low-income and minority concentration.
- Whether the applicant is actively engaged in promoting housing choice in all of its neighborhoods through participation in an areawide, affirmative marketing effort or other fair housing activities.
- Whether relocation which has been required as a result of federally-assisted programs has expanded housing opportunities for minorities outside areas of minority or low-income concentration.[15]

3. *Comprehensive Planning Assistance*

The comprehensive planning assistance program, commonly known as the "701 program,"[16] provides assistance to State and local governments and areawide planning organizations[17] for the improvement of planning and management capabilities.[18] The program encourages coordination among States and local jurisdictions in their planning efforts.[19] HUD planned to provide $62.4 million in grants for this program in fiscal year 1977.[20]

Objectives of the 701 program include the development and implementation of a comprehensive plan which focuses upon housing, land use, public facilities, and transportation planning, and, in general, the development of mechanisms to facilitate unified planning for capital improvement programs.[21] Among the activities that may be pursued under the 701 program are:

- The establishment of a mechanism for coordinating intergovernmental planning and development and public and private development;
- The identification and analysis of area needs, including housing, employment, education, and health, and formulation of specific programs for meeting those needs;
- The pursuit of long range physical and fiscal planning as a guide for governmental policy and action;
- The modernization or reorganization of State and local government infrastructure;
- The preparation, as a guide for governmental policies and action, of general plans for housing and land use; and
- The study of methods of achieving equal opportunity by the planning process.[22]

4. *Lower Income Rental Assistance*

Section 8 of the U.S. Housing Act of 1937, as amended by Title II of the Housing and Community Development Act of 1974[23], establishes a program whereby HUD subsidizes the rents of lower income families in order to aid those families "in obtaining a decent place to live and of promoting economically mixed housing."[24] Section 8 is designed to subsidize the rents of eligible households by paying the difference between rent charged by the owner and rent paid by the tenant (15 to 25 percent of the tenant's income). In general, families earning less than 80 percent of the current median income[25] in the metropolitan area qualify for assistance.[26] Under the Section 8 program for existing housing, the payment of rent subsidies for households is usually administered by public housing agencies. The Secretary is authorized to enter into "annual contribution contracts" with public housing agencies which then make housing assistance payments directly to owners of existing dwelling units.[27]

Since the basic intent of Section 8 is to assist households by subsidizing rental payments, the Section 8 program does not provide Federal funds for rehabilitation or construction. However, to encourage construction and rehabilitation, HUD contracts with builders and owners who, in accor-

[15] 43 Fed. Reg. 1605 (1978) to be codified in 24 C.F.R. § 570.452(d).

[16] National Housing Act of 1954, Pub. L. No. 480, § 1723, 68 Stat. 404 (1954) (prior to amendment). Amended by Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 686 (currently at 40 U.S.C. § 461) (Supp. V 1975). The 701 program was established by the Housing Act of 1954 as an aid to small communities and regional agencies in undertaking community development planning and implementation. Through a series of amendments, the objectives of the program and the categories of eligible recipients have been expanded to include improvement in management capabilities, development of land use priorities, and citizen involvement.

[17] HUD defines an "areawide planning organization" as an organization authorized by law or agreement between local jurisdictions to undertake planning for a metropolitan or nonmetropolitan area. 24 C.F.R. § 600.7(b) (1977).

[18] 40 U.S.C. § 461 (Supp. V 1975).

[19] *Id.*

[20] Hubachman letter.

[21] 24 C.F.R. § 600.5(a) and (b) (1977).

[22] 24 C.F.R. § 600.55(a), (b), (c), (d) (1977).

[23] Pub. L. No. 93-383, 88 Stat. 653 (codified at 42 U.S.C. § 1437f (Supp. V 1975)).

[24] 42 U.S.C. § 1437f(a) (Supp. V 1975).

[25] 42 U.S.C. § 1437f(c)(3) (Supp. V 1975).

[26] 42 U.S.C. § 1437f(1)(a) (Supp. V 1975).

[27] 42 U.S.C. § 1437f(b) (Supp. V 1975). In areas where the Secretary has determined that no public housing agency exists, or that the public housing authority is unable to implement the existing housing program, the Secretary is authorized to enter into contracts directly with owners. Hubachman letter.

dance with a HUD-approved proposal, agree to construct or substantially rehabilitate housing. Under the assistance contract, HUD agrees that it will make housing assistance payments to owners for new or rehabilitated units that are occupied by eligible lower income families.[28]

The fiscal year 1978 budget estimate for HUD housing assistance commitments (contract authority) under the Section 8 program is $1.25 billion per year.[29] Approximately $455 million (41 percent) of this amount is allocated for rent subsidies in newly constructed buildings; $377 million (34 percent) for rent subsidies in existing units; and $248 million (26 percent) for rent subsidies in buildings which have been substantially rehabilitated.[30]

5. Public Housing Program

The United States Housing Act of 1937, as amended, provides for assistance to locally operated public housing programs.[31] HUD pays debt service on bonds and notes issued by local housing authorities for construction projects to be owned and operated by the authorities and, also, contributes financial assistance to authorities for their operating costs.[32] In the 1979 budget it is estimated that HUD will contribute housing payments to local public housing authorities for some 1,174,000 locally operated units (cumulative from previous years).[33]

6. Mortgage Interest Subsidy Program

Section 235 of the National Housing Act of 1934, as amended by the Housing and Urban Development Act of 1968, authorizes HUD to subsidize the mortgage interest payments made by moderate-income families for the purchase of newly constructed homes.[34] In order to participate in the program, a homeowner must contribute at least 20 percent of adjusted gross monthly income toward mortgage, insurance, and taxes.[35] Moreover, the participant's household income must not exceed 95 percent of the area's median income, and the total purchase price of the property must not exceed 120 percent of the mortgage limitation ceiling.[36]

This program was reinstated in October 1975, having been dormant since 1973 when it was temporarily suspended.[37] In January 1976, $264.1 million in previously impounded funds were released by HUD for Section 235 subsidies.[38] Although funds available under the program were sufficient to provide mortgage interest subsidies for about 250,000 single-family homes, as of January 1978 only approximately 9,000 homes had been built and $21 million expended.[39] HUD has, however instituted several revisions in the program in an attempt to increase housing production.[40] These revisions raise mortgage ceiling limitations and require less initial financial obligation. Thus, HUD expects that in fiscal year 1979 it will make a commitment to subsidize approximately 30,000 to 40,000 homes.[41]

7. Mortgage Insurance Programs

The National Housing Act of 1934 provides for a number of FHA mortgage insurance programs,[42] all

[28] Vacancy payments may be made, up to 14 months, for units available to lower income families, provided the owner is making a good faith effort to rent them to eligible families. The amount of assistance provided is sufficient to cover the full cost of the housing, including debt service on the cost of rehabilitation or construction. Hubschman letter.

[29] Ibid.

[30] *Summary of the HUD Budget, FY 1979.*

[31] Ch. 896, 50 Stat. 888 (current version at 42 U.S.C. § 1437–1440 (Supp. V 1975)).

[32] Hubschman letter.

[33] *Summary of the HUD Budget, FY 1979.*

[34] National Housing Act of 1934, Pub. L. No. 479, § 1715z, 48 Stat. 343 (1934) (prior to 1974 amendment). Amended by Housing and Community Development Act of 1974, Pub. L. No. 93–383, 88 Stat. 671 (currently at 12 U.S.C. § 1715z (Supp. V 1975)).

[35] U.S., Department of Housing and Urban Development, *HUD Programs* (March 1977) (hereafter cited as *HUD Programs).*

[36] Ibid.

[37] The 1973 moratorium on federally-funded housing programs is discussed in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,* vol. VII, *To Preserve, Protect, and Defend the Constitution* (1977), p. 30 (hereafter cited as *To Preserve, Protect, and Defend).*

[38] U.S., Department of Housing and Urban Development, *HUD News,* HUD No. 78–25 (Jan. 22, 1978).

[39] Ibid.

[40] Ibid. For example, HUD has raised the mortgage limitation ceiling from $25,000 (for families with five or fewer members) and $29,000 (for larger families) to $32,000 and $38,000, respectively. If the total mortgage exceeds this ceiling, HUD cannot subsidize the interest payments. Mortgage limitation ceilings for large families in high cost areas increased from $33,000 to $44,000. Another revision is that HUD subsidies may effectively reduce to as low as 4 percent the interest rate which families pay on their mortgages. Previously, the effective rate could go only as low as 5 percent. Another new requirement is that the homeowner must provide a minimum downpayment of 3 percent of the total purchase price; this requirement replaces the previous one which dictated a minimum downpayment of at least 3 percent of the first $25,000 and 5 percent of any additional amount of the purchase price. *Housing Affairs Newsletter.*

[41] HUD observes that:

> [P]ursuant to Section 213 of the Housing and Community Development Act of 1974, subsidized and assisted units must be fairshared to localities in a manner consistent with HUD-approved Housing Assistance Plans submitted as part of annual Community Development Block Grant applications. Nearly 80% of funds go to communities with HAPs. Allocations not based on HAPs include: (1) 12 or fewer units; (2) New Communities funds under Title IV of the 1968 HUD Act and Title VII of the 1970 HUD Act; and (3) housing financed by loans or loan guarantees from a state agency.

Hubschman letter.

[42] The National Housing Act of 1934, Pub. L. No. 479, § 1709 and 1715l, 48 Stat. 194 and 283–287 (1934) (prior to 1974 amendment) (currently at 12 U.S.C. § 3601–3619, 3631 (1970 and Supp. V 1975)).

administered by the Assistant Secretary for Housing—FHA Commissioner.[43] The purpose of these programs is to facilitate homeownership and the construction and financing of housing. In 1977, $11.4 billion of insurance was written or outstanding under the Section 221 programs.[44] By insuring commercial lenders against loss, FHA encourages capital investment in the home mortgage market.[45] Currently, the most active programs, as judged by the dollar value of the amount of insurance written and outstanding, are those authorized by Section 203[46] and Section 221[47] of the National Housing Act of 1934, as amended by the Housing and Community Development Act of 1974.[48]

The Section 203 program provides mortgage insurance for unsubsidized structures housing one to four families.[49] FHA insures loans made by private financial institutions for up to 30 years and 97 percent of the property value.[50] The program is available to persons able to make the cash investment and the mortgage payments.[51] In 1977, $52 billion of insurance was written or outstanding under the Section 203 program.[52]

The Section 221 program has three components. The Section 221(d)(2) program is a homeownership program for low- and moderate-income families and provides mortgage insurance especially to those marginal income families displaced by urban renewal or related activities.[53] Under Section 221(d)(2), HUD insures lenders against loss on loans to finance the purchase, construction, or rehabilitation of low-cost, one- to four-family housing.[54]

The Section 221(d)(3) and 221(d)(4) programs provide mortgage insurance to finance the construction or rehabilitation of multifamily (five or more units) rental housing for low- and moderate-income or displaced families.[55] Units financed under either program may also qualify for assistance under Section 8 of the Housing and Community Development Act of 1974[56] if occupied by eligible low-income families.[57]

B. Civil Rights Responsibilities

1. Title VIII

HUD is responsible for the overall administration of Title VIII,[58] which also charges HUD with investigating complaints of discrimination.[59] The Department is hampered in its power to require compliance with Title VIII because it has no enforcement authority. If it finds discrimination, it can use only methods of conference, conciliation, and persuasion to bring about compliance.[60]

The Secretary of HUD recently commented on this dilemma:

> The lack of adequate enforcement power has been the most serious obstacle to the development of an effective Fair Housing Program within HUD. Our present authority is limited to a purely voluntary process of "conference, conciliation, and persuasion". . . .Simply put, "conciliation" all too often has proved an inadequate means of securing compliance with the substantive provisions of Title VIII.
>
> Respondents frequently ignore HUD's conciliation process because there is no real inducement to cooperate. Where conciliation is successful, it is most often because the respondent knows that a realistic threat of private litigation is present, should HUD's efforts fail.
>
> But where the victim of discrimination meets with the HUD conciliator and with the respondent, and it is evident that the complainant is unrepresented by counsel, conciliation often collapses. There is no credible threat of "consequences" should the respondent refuse to cooperate.
>
> The most significant deterrent to litigation remains its high cost. Many complainants do

[43] Pub. L. No. 479, § 1, 48 Stat. 1246 (currently at 12 U.S.C. § 1702) (Supp. V 1975). Although the Federal Housing Administration (FHA) no longer exists, HUD continues to use the term FHA to describe the programs once administered by that agency. The insurance program provides that if the borrower does not repay the loan, HUD will repay it or some portion of it, depending on the terms of the insurance.

[44] Benjamin Tyner, Mortgage Insurance Counseling Division, Office of Housing, HUD, telephone interview, Apr. 5, 1978 (hereafter cited as Tyner telephone interview).

[45] *HUD Programs.*

[46] 12 U.S.C. § 1709 (Supp. V 1975).

[47] 12 U.S.C. § 1715 (Supp. V 1975).

[48] 42 U.S.C. § 5301 (Supp. V 1975).

[49] *HUD Programs.*

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] National Housing Act of 1934, Pub. L. No. 479, § 1715l, 48 Stat. 284 (1934) (prior to 1974 amendment). Amended by Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 677 (currently at 12 U.S.C. § 1715l) (Supp. V 1975).

[54] *Id.*

[55] *HUD Programs.* There are two principal differences between Section 221(d)(3) and 221(d)(4) programs: (1) HUD will insure 100 percent of the project value under Section 221(d)(3) and 90 percent under Section 221(d)(4); (2) under Section 221(d)(3), applicant eligibility is limited to public agencies or nonprofit organizations while under Section 221(d)(4) participation is restricted to profit-motivated sponsors.

[56] 42 U.S.C. § 1437f (Supp. V 1975).

[57] Tyner telephone interview.

[58] 42 U.S.C. § 3608(a) (1970).

[59] 42 U.S.C. § 3610(a) (1970).

[60] *Id.*

not have the necessary funds to initiate litigation, even with the prospect of having attorney's fees awarded should the complainant's position prevail. Thus, as a practical matter, many complainants are unable to utilize the right to seek a remedy through the courts, and therefore must rely solely on the administrative process.

This is so despite the existence of another avenue of litigation to correct discriminatory housing practices—the filing of a pattern or practice suit by the U.S. Department of Justice, pursuant to Section 813. While pattern or practice suits can result in the correction of discriminatory practices, this type of civil action does not often provide an individual remedy.[61]

Among the duties assigned to HUD under Title VIII are to make studies, publish reports, and cooperate with and provide assistance to other governmental and private organizations which are formulating or carrying out programs to prevent or eliminate discriminatory housing practices.[62] In addition, Section 808(e) of the Civil Rights Act of 1968 requires HUD to administer its programs and activities relating to housing and urban development in a manner that affirmatively furthers the purpose of the law.[63]

2. *Title VI*

HUD and all other Federal agencies providing assistance through grants, contracts, or loans[64] are responsible for ensuring that recipients of such assistance comply with Title VI of the Civil Rights Act of 1964.[65] Under this legislation, HUD has the authority to withhold or withdraw funds from those recipients found to be in violation of this civil rights provision.[66] Title VI, however, places programs of insurance and guaranty outside its parameters.[67] Thus, it does not prohibit discrimination in HUD mortgage insurance programs.

3. *Section 109*

It is the responsibility of the Secretary of HUD to secure compliance under Section 109 of the Housing and Community Development Act of 1974, the nondiscrimination provision of the community development block grant program.[68] If a recipient is found in noncompliance, the Secretary has the responsibility to request that appropriate officials (i.e., the Governor or local chief executive) secure compliance; if compliance is not secured within 60 days, the Secretary of HUD may begin proceedings to terminate, reduce, or limit the availability of payments, and/or refer the matter to the Department of Justice for civil action.[69] HUD notes that, "The affirmative requirements of Section 109 are carried out in the same manner as those of Title VI, except that the non-discrimination provisions of Section 109 apply to sex as well as race, color and national origin."[70]

4. *Equal Credit Opportunity Act (ECOA)*

Since HUD sets standards for creditworthiness for persons applying for HUD-insured loans, HUD's foremost role under the Equal Credit Opportunity Act[71] is as a creditor,[72] and it may not practice discrimination prohibited by the act. In addition, in the view of this Commission, HUD has the responsibility to ensure that it does not do business with

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[61] Patricia R. Harris, Secretary of Housing and Urban Development, testimony before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Feb. 2, 1978.

[62] 42 U.S.C. §§ 3608(d)(1) and 3609 (1970).

[63] The Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 84, 85 (codified at 42 U.S.C. § 2608(d)(5) (1970)). HUD has commented:

> Pursuant to this requirement, the Department has developed affirmative marketing regulations, site and neighborhood standards, and relocation standards which govern how housing choices are to be made available outside areas of minority concentration, as well as within areas of minority concentration. CDBG recipients are required to take action to further fair housing in the private market, as well as to administer all of their programs and activities relating to housing and urban development in an affirmative manner to further fair housing. In addition, the Equal Housing Opportunity Plan (EHOP) program, developed jointly by the Assistant Secretaries for Housing, Community Planning and Development, and [Fair Housing and Equal Opportunity], is designed to further fair housing across jurisdictional lines. Hubachman letter.

These actions are discussed in the sections of this chapter which follow.

[64] The Economic Development Administration, within the Department of Commerce, for example, provides assistance for water and sewer facilities, development of industrial parks, access roads, and other economic development-oriented projects. For further discussion of Federal agencies providing assistance through grants and loans, see chapter entitled "Other Agencies."

[65] 42 U.S.C. § 2000d-1 (1970). For an evaluation of HUD's Title VI program, see U.S. Department of Justice, Federal Programs Section, Civil Rights Division, *Intragency Survey Report: Evaluation of Title VI Enforcement at HUD* (September 1977) (hereafter cited as *DOJ Intragency Survey Report).*

[66] 42 U.S.C. § 2000d-1 (1970).

[67] 42 U.S.C. § 2000d-4 (1970).

[68] Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 649 (codified at 42 U.S.C. § 5309 (Supp. V 1975)).

[69] 42 U.S.C. § 5309(b) (Supp. V 1975).

[70] Hubachman letter.

[71] 15 U.S.C. § 1691(e) (1976).

[72] The Equal Credit Opportunity Act defines "creditor" as any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit. 15 U.S.C. § 1691(e) (1976). HUD's role as a creditor is similar to that of the Veterans Administration. See the chapter in this report on the Veterans Administration for a discussion of the Veterans Administration's role under ECOA.

lenders who fail to comply with ECOA. ECOA does not assign HUD any specific role for enforcement. However, to ensure that it does not abet illegal discrimination, it is incumbent upon HUD to make certain that the lenders with whom it does business comply with Federal law and do not deal unfairly with persons applying for HUD-insured mortgages. HUD states that it has "amended and revised its forms and handbooks to comply with ECOA requirements."[73]

5. Executive Order No. 11,063

HUD must attempt to remedy any violation of Executive Order No. 11,063[74] in its programs by conference, conciliation, and persuasion unless similar efforts made by another Federal department have been unsuccessful.[75] Pursuant to an unsuccessful attempt at conciliation, HUD may: (1) cancel or terminate in whole or in part any agreement or contract with the person, firm, or State or local public agency found in noncompliance; (2) refrain from extending any further aid under any program administered by it until the order is satisfied; (3) refuse to approve a lending institution or any other lender as beneficiary under any program administered by it; or (4) refer the matter to the Department of Justice.[76]

II. Organization, Staffing, and Budget

Although Title VIII gives the Department of Housing and Urban Development the authority to create an Assistant Secretary position,[77] that position has not been used primarily for the administration of Title VIII. Rather, HUD's Assistant Secretary for Fair Housing and Equal Opportunity has been delegated the responsibility of administering HUD's Office of Fair Housing and Equal Opportunity, which is assigned myriad duties in addition to Title VIII, including contract compliance and equal opportunity in Federal employment.

In support of its actions, HUD observes:

> Title VIII. . .does not enumerate specific duties and responsibilities for the office. The Department has interpreted this mandate broadly rather than narrowly. Accordingly, HUD has combined under this Assistant Secretary responsibility not only for Title VIII, but also for the enforcement of all civil rights statutes and Executive Orders previously cited. HUD believes this combination can produce more effective enforcement of its full range of civil rights responsibilities.[78]

This Commission finds, however, that HUD's fair housing responsibilities, which include administering Title VIII, providing leadership to other Federal agencies to further fair housing, and studying and reporting on the nature and extent of housing discrimination in the United States, are sufficiently important to warrant full-time oversight by a Federal official with Assistant Secretary status. In light of the seriousness of the problems of housing discrimination and the inadequacy of Federal efforts to combat that discrimination, it is especially important that these duties be assumed on a full-time basis. The great bulk of the Assistant Secretary's efforts must be directed toward establishing and overseeing a more effective Federal program to secure compliance with Title VIII. However, because HUD has assigned myriad civil rights functions to the Assistant Secretary position granted HUD by Title VIII, there is no Federal official of Assistant Secretary status with full-time responsibility for administering Title VIII.

HUD does not explain why it believes that its current arrangement for assigning responsibility for all of its equal opportunity programs to one Assistant Secretary is so effective. There are definite advantages to assigning responsibilities for such functions as contract compliance and internal equal employment opportunity to a high level Department official. However, by giving one Assistant Secretary multiple equal opportunity duties that are not directly related to each other, the effect has been to create an equal opportunity unit separate from the day-to-day operation of the agency.

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[73] Hubschman letter.

[74] Exec. Order No. 11,063, 3 C.F.R. 659 (1959–63 Compilation). HUD has informed this Commission that a comprehensive Department-wide regulation implementing Executive Order 11,063 pursuant to Section 203 of that order is currently in internal departmental clearance. Hubschman letter.

[75] Exec. Order No. 11,063, 3 C.F.R. 302 (1959–63 Compilation).

[76] *Id.* Under Exec. Order No. 11,063, each Federal department and agency is responsible for obtaining compliance with this directive as it applies to programs administered by it. Additionally, each department and agency is directed to issue rules, regulations, policies, and procedures to implement the order.

[77] 42 U.S.C. § 3533 (1970). Title VIII provides for the position of an additional Assistant Secretary but does not specify that the administration of fair housing/equal opportunity must be the function of that new position. Since the position was created pursuant to Title VIII, however, the function of the new Assistant Secretary would seem to be implicit as that concerning fair housing.

[78] Hubschman letter.

A. Organization

In August 1978, HUD wrote to this Commission:

> HUD recently implemented a new organizational structure to strengthen the role and authority of its Assistant Secretaries over field operations. While it is too early to evaluate its impact, the new structure better concentrates the authority of the Assistant Secretary over (1) technical assistance and program guidance functions; (2) classification and organization of the field FH&EO activity; and (3) goal setting and evaluation for operational programs.[79]

1. Central Office

The Office of Fair Housing and Equal Opportunity (FHEO) oversees all HUD civil rights activities, including equal opportunity in housing and related facilities. In addition, FHEO duties include equal opportunity in all HUD-assisted programs, equal employment programs within the Department, and equal employment opportunity in Federal contracts. It is the central Office of Fair Housing and Equal Opportunity which is responsible for the development of policy, regulations, and instructions and for general oversight of all equal opportunity divisions in the field offices.

FHEO is comprised of several major offices: Management and Field Coordination, Fair Housing Enforcement and Section 3 Compliance, HUD Program Compliance, Contract Compliance Programs, and Voluntary Compliance.[80]

Office of Management and Field Coordination

The Office of Management and Field Coordination develops and recommends policy for the implementation of equal opportunity programs. The Office is responsible for integrating all civil rights objectives into the management of HUD programs. The Office provides the administrative and management services required for operating fair housing and equal opportunity programs at the national and regional levels. Its duties include the preparation of the FHEO budget and staff training. It has the sole responsibility for entering into and overseeing FHEO contracts, including the monitoring and development of research, studies, and demonstration projects.[81]

Office of Fair Housing Enforcement and Section 3 Compliance

This Office is responsible for the enforcement of Title VIII of the Civil Rights Act of 1968, as amended,[82] Executive Order 11,063,[83] and Section 3 of the Housing and Urban Development Act of 1968.[84] HUD has described the activities of two divisions in that Office:

> The Fair Housing Enforcement Division performs compliance and enforcement activities under Title VIII, including processing Title VIII complaints, conciliation activity, referrals to State agencies, and Title VIII compliance reviews, as well as monitoring and review of affirmative fair housing marketing plans. The Division also conducts administrative meetings to address various fair housing issues. The Section 3 Compliance Division performs enforcement and compliance activities under Section 3 of the Housing and Urban Development Act of 1968, as amended.[85]

Office of HUD Program Compliance

The Office of HUD Program Compliance is composed of two divisions—Program Compliance and Public Employment. The Program Compliance Division is responsible for all compliance and enforcement activities under Title VI of the Civil Rights Act of 1964[86] and Section 109 of the Housing and Community Development Act of 1974.[87] The Public Employment Division has the responsibility for the processing of complaints of discrimination filed against HUD by its employees[88] and for the monitoring of affirmative action plans.[89]

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[79] Ibid.

[80] U.S., Department of Housing and Urban Development, *Justification for 1978 Estimates* (March 1977) (hereafter cited as *Justification for 1978 Estimates*), and Augustus Clay, Director, Field Support and Evaluation, FHEO/HUD, telephone interview, Apr. 10, 1978 (hereafter cited as Clay telephone interview). In addition, the Office of Contract Compliance Programs, created to address HUD's new responsibilities following a Government-wide reorganization under Executive Order No. 11,246, has no fair housing responsibilities. The contract compliance function is currently scheduled to be transferred to the Department of Labor on October 1, 1978. Executive Order 11,246 directs HUD to promote and ensure equal opportunity to those employed or seeking employment with Federal contractors or recipients of Federal assistance. Exec. Order No. 11,246, 3 C.F.R. 339 (1964–65 Compilation).

[81] *Justification for 1978 Estimates.*

[82] 42 U.S.C. § 3608(a) (1970).

[83] Exec. Order No. 11,063, 3 C.F.R. 659 (1959–63 Compilation).

[84] Section 3 requires applicants, recipients, contractors, and subcontractors in HUD-funded programs to provide opportunities for training and employment to low-income residents of areas where HUD-assisted projects or activities are located. Pub. L. No. 90–448, § 3, 82 Stat. 476 (codified at 12 U.S.C. § 1701m (Supp. V 1975)).

[85] Hubschman letter.

[86] 42 U.S.C. § 2000d–1 (1970).

[87] 42 U.S.C. § 5309(b) (Supp. V 1975).

[88] *Justification for 1978 Estimates.*

[89] Hubschman letter.

Office of Voluntary Compliance

The Office of Voluntary Compliance administers voluntary program activity with respect to equal opportunity. Within this Office there are two Divisions, Housing and Community Development and Manpower and Business Development. The Division of Housing and Community Development has responsibility for working with members of the real estate industry, national organizations, firms, Federal agencies, and State and local governments to assist them in developing voluntary fair housing programs and policies.[90] The Manpower and Business Development Division is responsible for implementing voluntary compliance programs to expand employment, training, and business opportunities for minorities and low-income residents of HUD-funded projects.[91]

2. Regional Office Organization

The Regional Office is the highest level HUD field office. Regional Offices, headed by Regional Administrators, supervise Area Offices and monitor and evaluate overall program performance and general management of Area Offices and their subordinate offices. Regional Administrators are responsible for assuring that program goals are met and for redistributing among Area Offices program funds which become available. They assure that all programs function in accordance with policies, criteria, and procedures established by HUD Assistant Secretaries.[92]

HUD has commented:

> Aside from coordinating HUD's activities with those of other Federal departments and agencies within their respective jurisdictions, the Regional Administrators have a special responsibility to assure that HUD's other program responsibilities are "meshed" with its Fair Housing and Equal Opportunity Program and carried out in a manner to effectuate that program's requirements. Furthermore, the Regional Administrator has program operational responsibility for the Regional Fair Housing and Equal Opportunity Program and supervises the Director, Office of Regional Fair Housing and Equal Opportunity.[93]

The Director, Office of Regional Fair Housing and Equal Opportunity (DR/FHEO), is primarily responsible to the Regional Administrator for the day-to-day implementation of HUD's equal opportunity program. HUD notes that "He or she also is responsible for monitoring and evaluating the overall management of [fair housing and equal opportunity programs] within the region."[94]

However, the Assistant Secretary has no direct authority to supervise the activities of HUD field staff responsible for the investigation and attempted resolution of Title VIII complaints. Instead, these staff report to officials who spend the majority of their time on the implementation of HUD programs. In August 1978, HUD commented:

> [U]nder HUD's recently implemented reorganization, the Assistant Secretary for Fair Housing and Equal Opportunity has been given increased responsibility and authority over the Department's field activities. The Assistant Secretary now provides technical assistance and program guidance directly to all field offices rather than through the Regional Office; he, rather than the Regional Administrator, grants waivers as appropriate; he allocates funds to Regional and field offices; he delegates authority to field offices; he makes and interprets policy; he directs, monitors and evaluates Department-wide program administration and performance; and he sets goals for each program in each Regional Office, setting priorities and allocating resources for goal accomplishment.
>
> While the Assistant Secretary does not have direct line authority to supervise the daily activities of HUD field staff responsible for the investigation and attempted resolution of Title VIII complaints, he does retain the authority to withdraw delegations of authority to field staff and "override" the Regional Administrator if he or she does not effectively oversee field activities.[95]

Moreover, with respect to the enforcement of Title VI,[96] the DR/FHEO reports directly to the Assistant Secretary for Fair Housing and Equal Opportunity.[97] Nonetheless, the Assistant Secretary's authority with regard to both Title VIII and Title VI is

[90] *Justification for 1978 Estimates.*

[91] *Justification for 1978 Estimates.* HUD's 1977 budget estimates, which describe the functions of this office, do not indicate that the office is responsible for expanding employment, training, and business opportunities for women.

[92] Hubschman letter.

[93] Ibid.

[94] Ibid.

[95] Ibid.

[96] 42 U.S.C. § 2000d-1 (1970).

[97] Lauren[illegible] O. Pearl, Director, Office of HUD Program Compliance, interview, Nov. 22, 1977.

limited because the Regional Administrator and not the Assistant Secretary has the authority to both hire and dismiss the DR/FHEO.[98] HUD proposes a partial solution to this problem. HUD wrote to this Commission, "HUD's new reorganization. . .contemplates participation by the Assistant Secretary in the selection, classification and evaluation of these officials, and policies and procedures are about to be promulgated to effect these changes."[99]

Each Office of Regional Fair Housing and Equal Opportunity is composed of a Division of Fair Housing and Equal Opportunity Compliance, a Division of Contract Compliance, and a Division of Field Support and Evaluation. The Division of Fair Housing and Equal Opportunity Compliance is responsible for carrying out activities planned at the central office by both the Office of Fair Housing Compliance and the Office of HUD Program Compliance. The Division has the responsibility for administering Title VIII,[100] Title VI,[101] Section 109,[102] and Executive Order No. 11,063,[103] including such activities as conducting complaint investigations and compliance reviews.

The Division of Field Support and Evaluation is responsible, at the regional level, for carrying out the activities planned by the Office of Management and Field Coordination at the central office. The Division assists the Regional Administrator by providing training and technical assistance, monitoring and evaluating HUD's fair housing and equal opportunity performance, and coordinating voluntary compliance programs regionwide. The Office of Voluntary Compliance at the central FHEO office does not have a counterpart in the field.

3. Area and Service Offices

As of August 1, 1978, HUD had 41 area offices[104] with direct funding responsibilities for the various housing, planning, and community development programs in their geographic jurisdictions, and 7 insuring offices with direct funding responsibilities for FHA multifamily mortgage programs within their jurisdictions. The heads of both types of offices report to the Regional Administrator. Applications for multifamily insurance and mortgage insurance, loans, and grants under these programs are submitted to area offices or, where applicable, insuring offices, which, in general, have the decisionmaking responsibility of approving or disapproving them. HUD also has five multifamily service offices that process FHA insurance applications, 22 single-family service offices, 8 valuation and endorsement stations that process single-family mortgage insurance applications, and 21 valuation stations.[105]

In each Area Office there is an Equal Opportunity Division responsible for the review of applications for compliance with FHEO standards as well as the review and approval of affirmative fair housing marketing plans and voluntary compliance programs. The Equal Opportunity Division is also responsible for monitoring performance of HUD recipients and grantees and provides technical assistance to these recipients. The Fair Housing/Equal Opportunity Director at the area office level is directly responsible to the area office manager. HUD has commented:

> [A]n Area Office Manager is the highest FH&EO official in the Area Office. He or she is specifically charged with carrying out FH&EO program responsibilities, just as he or she is charged with other housing and community development program responsibilities, and is held accountable for performance in FH&EO areas as he or she is for performance in the housing and community development programs. The Department's operating plan and management reporting systems set requirements and monitor performance equally in all areas.[106]

Nonetheless, little decisionmaking authority has been delegated to the Division of Fair Housing/Equal Opportunity at the area office level. This is exemplified, particularly, by the community development block grant program. The area office FHEO has the authority only to recommend disapproval or conditioning of an application to the area office manager when equal opportunity deficiencies exist. If the area office manager, who spends most of his or her time on HUD programs and not on fair housing, fails to concur with FHEO's recommendations and determines that a communi-

[98] Mary Pinkard, Director, Division of Program Standards, Office of Fair Housing/Equal Opportunity, telephone interview, June 28, 1978.
[99] Hubachman letter.
[100] 42 U.S.C. § 3608(a) (1970).
[101] 42 U.S.C. § 2000d–1 (1970).
[102] 42 U.S.C. § 5309 (Supp. V 1975).
[103] Exec. Order No. 11,063, 3 C.F.R. 639 (1959–63 Compilation).
[104] *Justification for 1978 Estimates.* Under a proposed reorganization, the number of HUD area offices will be reduced to 39.
[105] Hubachman letter.
[106] Ibid.

EXHIBIT 1.1

Distribution of Staff Years, Office of Fair Housing and Equal Opportunity, Fiscal Year 1977

Office	Staff years	
Central Office	105.5	
Assistant Secretary		19.7
Management and Field Coordination		34.8
Fair Housing and Contract Compliance		16.2
Program Compliance		16.2
Voluntary Compliance		18.6
Field Offices	403.6	
Total	509.1	

Source: U.S., Department of Housing and Urban Development, *Justification for 1978 Estimates* (March 1977).

ty's application merits approval, the application is approved.[107] Thus, unless the area office manager concurs with FHEO's recommendations, neither the Director of the Office of Regional Fair Housing/Equal Opportunity on the Assistant Secretary for FHEO is ever made aware of equal opportunity deficiencies.

B. Staffing

In fiscal year 1977, HUD allocated 509.1 staff years to activities of the Office of Fair Housing and Equal Opportunity: 105.5 staff years in the central office and 403.6 years in the regional, area, and insuring offices.[108] The distribution of staff years among the various units in the central office is illustrated in exhibit 1.1. A review of HUD's budget[109] indicated that only a little more than half of the total FHEO staff time was allocated to fair housing and related activities.[110]

HUD's budget contained detailed estimates of the amount of time spent on activities to be conducted in the regional and area offices. In particular, HUD estimated that in the regional offices, a total of 71.2 staff years would be used to administer the Department's Title VIII responsibilities. The bulk of this time was to be for the closure of complaints, which HUD estimated would constitute 65 staff years. At the regional level, Title VI and Section 109 activities were estimated to comprise 25.2 staff years.[111] The largest block of this time—9.7 staff years—was to be allocated for conducting compliance reviews under the community development block grant program. Other compliance reviews accounted for 9.2 staff years, while 3.2 staff years were allocated for the closure of Title VI complaints.[112]

HUD also estimated that at the area office level, 149 staff years would be spent on "office operations," which include equal opportunity reviews of community development block grant applications and performance reports and the referral of Title VIII complaints to regional offices.[113] HUD's budget does not contain similar estimates for central office activity.

Evidence that HUD's small staff size has had a crippling effect on its fair housing program is contained in HUD's *Headquarters Report: On-Site Operational Performance Evaluations* [114] and a De-

[107] Only the Office of the Secretary has the authority to disapprove a community development block grant application. Unless the area office director recommends disapproval, however, a community's application typically does not come to the attention of the Secretary. "Levels of Approval Authority," HUD Handbook 1105.1 (draft proposal), Fall 1977.

[108] *Summary of the HUD Budget: Fiscal Year 1979.*

[109] HUD's budget is discussed in detail, below, this section.

[110] As discussed above, the duties of these staff include contract compliance and HUD internal employment activities.

[111] *Justification for 1978 Estimates.*

[112] Ibid.

[113] Ibid.

[114] Commission staff reviewed HUD's *Headquarters Report: On-Site Operational Performance Evaluation* from all 10 of the HUD regions by region and date. U.S., Department of Housing and Urban Development,

partment of Justice study on HUD's Title VI enforcement effort.[115] Because limited staff time has been allocated to fair housing and related activities, HUD's potential for fair housing accomplishments has been severely curtailed. For example, in some HUD regions, monitoring and compliance reviews under the community development block grant program have been conducted only at the expense of other equal opportunity responsibilities[116] or have not been conducted at all.[117] Title VI compliance reviews have never reached as many as 2 percent of HUD's 14,000 recipients in any year.[118] Moreover, some reviews have been inadequate and untimely,[119] and FHEO staff have not satisfactorily reviewed applications under the community development block grant program for civil rights concerns.[120]

HUD has made a commitment to improve the quality of these reviews (which have been essentially technical), to ensure that the applications contain all the required elements to include a substantive review of the program the applicants propose.[121] HUD has also indicated that, in fiscal year 1978, it will attempt to increase the number of community development block grant compliance reviews of entitlement communities by 8 percent; from 12 percent in fiscal year 1977 to 20 percent in fiscal year 1978.[122] This increase in review activity, states HUD, "is required to maintain the credibility of the Department's civil rights effort in the administration of the block grant program."[123] The Assistant Secretary for Community Planning and Development suggests that the current administration's policy of substantive review will demand a greater amount of staff time than past technical reviews.[124] Clearly, without additional FHEO staff, HUD will have difficulty in meeting its new goals for the community development block grant program. In addition, with its small equal opportunity staff, HUD has been unable to fulfill its duty under Title VIII[125] to design a comprehensive program to provide guidance and leadership to other Federal agencies. HUD and the Department of Justice (the only Federal agency with direct enforcement duties under Title VIII) have failed to coordinate their fair housing programs.[126]

In 1974 this Commission recommended that HUD undertake 50 communitywide pattern and practice fair housing reviews[127] of all major institutions in those communities which affect the production, sale, and rental of housing, including State and local government, housing authorities, builders and developers, real estate brokers, and lenders. This recommendation was renewed in 1978.[128] But without a substantial increase in HUD's staff, such reviews will not be possible on a regular basis. HUD contemplates a partial remedy for this deficiency. In August 1978, HUD reported that on April 17, 1978, Secretary Harris announced her intention to create "systemic discrimination units" to accomplish such reviews on a limited, demonstration basis.[129]

C. Budget

In fiscal year 1979, HUD will spend $18.8 million for all of its fair housing and equal opportunity activities.[130] According to material HUD provided to the Office of Management and Budget in

Headquarters Report: On-Site Operational Performance Evaluation (1975–1977) (hereafter cited as *HUD On-Site Operational Performance Evaluation.)*

[115] *DOJ Interagency Survey Report,* p. 14.

[116] The Atlanta Regional Office reports that the timely review of community development block grant applications can be completed only at the expense of other FHEO responsibilities. The Atlanta Regional Office also indicates that "there have been periods" in one area office when the Equal Opportunity Division consisted of only one staff member. Similarly, the Denver Regional Office conducts compliance reviews of block grant recipients at the expense of other fair housing activities. *HUD On-Site Operational Performance Evaluation* (Atlanta), p. 81, and (Denver), p. 109.

[117] *HUD On-Site Operational Performance Evaluation* (Chicago), p. 55.

[118] *Justification for 1978 Estimates.*

[119] In the Boston Regional Office, program staff were critical of the quality and timeliness of FHEO reviews under the community development block grant programs. The Department's *On-Site Operational Performance Evaluation* for the Boston Region indicates the following: "Because of limited staff and the short time period for receipt and review of [community development block grants] it has not been possible to perform FHEO reviews in a timely manner." *HUD On-Site Operational Performance Evaluation* (Boston), p. 69.

[120] The Department of Justice states: "There are many factors that help explain the unevenness and low quality of [EO] work performed. . . .A[n] explanation for the low quality of some EO work is that many area office equal opportunity divisions are seriously understaffed." The Department of Justice also found that: "Area office EO staff had to assess a large number of applications concurrently. Several EO directors complained that they often found that there was insufficient time to get additional information and conduct the necessary reanalysis." *DOJ Interagency Survey Report,* pp. 16–19.

[121] This commitment is discussed at length in the section in this chapter on the community development block grant program.

[122] *Justification for 1978 Estimates.*

[123] Ibid.

[124] Community Planning and Development, Central Office, memorandum to HUD Field Staff, "Monitoring of Entitlement Communities under the CDBG Program," January 1978.

[125] 42 U.S.C. § 3608(a) (1970).

[126] HUD's interagency efforts are discussed at length in the section of this chapter on interagency coordination.

[127] U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,* vol. II, *To Provide. . .For Fair Housing* (1974), p. 346 (hereafter cited as *To Provide. . .For Fair Housing).*

[128] U.S., Commission on Civil Rights, *The State of Civil Rights: 1977* (1978), p. 18.

[129] Hubschman letter.

[130] U.S., Office of Management and Budget, *United States Budget, Fiscal Year 1979 Special Analyses,* (1978), p. 286 (hereafter cited as *Special Analyses, Fiscal Year 1979).*

EXHIBIT 1.2

HUD Budget for Administration of Title VIII (in millions of dollars)

Fiscal year	Expenditures for fair housing and equal opportunity	Expenditures for Title VIII administration	Title VIII expenditures as a percent of fair housing and equal opportunity expenditures	Title VIII expenditures in constant (1969) prices**
1974	$ 8.5	$4.3*	50.9	$3.0
1975	10.9	4.7*	43.1	3.0
1976	10.6	5.2*	49.1	3.1
1977	12.8	5.1*	39.8	2.8
1978	15.5*	5.8*	37.4	3.0
1979	18.8*	7.8*	41.5	3.8

*Estimate

**Derived from price deflectors supplied by the Office of Management and Budget.

Source: U.S., Office of Management and Budget, *Budget of the United States, Special Analyses*, for fiscal years 1973-79. Although the United States Budget is the source for these figures, HUD estimates that its expenditures for fair housing and equal opportunity for fiscal years 1977, 1978, and 1979 are $13.0 million, $15.9 million, and $17.7 million, respectively. Henry A. Hubschman, Executive Assistant to the Secretary, letter to Louis Nuñez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 17, 1978.

conjunction with the preparation of the fiscal year 1979 budget, only $10 million, or 53 percent, of that amount will be spent on fair housing and related activities,[131] including the administration of Title VIII of the Civil Rights Act of 1968,[132] Title VI of the Civil Rights Act of 1964,[133] Section 109 of the Housing and Community Development Act of 1974,[134] and Executive Order No. 11,063.[135] As shown in exhibit 1.2, Title VIII activities alone will account for only $7.8 million, or 41.5 percent, of HUD's fair housing and equal opportunity budget.[136]

HUD's Title VIII budget has increased over the past several years (from $4.3 million in fiscal year 1974 to $7.8 million in fiscal year 1979). However, the effect of these increases has been to maintain a consistent level of effort during a period of inflation. As shown in exhibit 1.2, from 1974 through fiscal year 1978, HUD's Title VIII budget was sufficient only to cover a program which would have cost about $3 million in 1969.[137] Moreover, although the *Special Analyses of the Budget* reflects a $2 million increase for fair housing activities from fiscal year 1978 to 1979, HUD budget staff indicated that the increase is actually for contract compliance activities and not for fair housing.[138] The Government devotes far fewer resources to combating housing discrimination than it does to ending employment discrimination. In fiscal year 1979, for example, the Government anticipates that it will allocate $301.1 million for ensuring equal employment opportunity, but only $17.4 for fair housing in all Federal agencies.[139]

In the view of this Commission, HUD's small budget for fair housing reflects the fact that the

[131] U.S., Department of Housing and Urban Development, *Fiscal Year 1979 Budget Submission for Special Analysis of Civil Rights Activities* (1978).
[132] 42 U.S.C. § 3608(a) (1970).
[133] 42 U.S.C. § 2000d-1 (1970).
[134] 42 U.S.C. § 5309 (1970).
[135] Exec. Order No. 11,063, 3 C.F.R. 659 (1959–63 Compilation).
[136] *Special Analyses, Fiscal Year 1979*, p. 283.
[137] The Office of Management and Budget has calculated price deflectors which indicate the cost each year for Federal purchases which would have cost $100 in 1969. These price deflectors are: 1974, $141.52; 1975, $157.53; 1976, $168.83; 1977, $181.35; 1978, $193.16 (estimate); and 1979, $207.52 (estimate). Thus, for example, in 1974 it cost the Federal Government $141.52 for purchases which cost only $100 in 1969. Kenneth A. Sprankle, Fiscal Economist, Office of Management and Budget, telephone interview, Apr. 3, 1978.
[138] Clay telephone interview.
[139] *Special Analyses, Fiscal Year 1979*, p. 286. The figure for ensuring equal opportunity does not cover equal opportunity in the military. The figure for fair housing, however, does include $2.5 million for ensuring fair housing for military personnel and civilian employees of the Department of Defense.

Federal Government has placed a low priority on fair housing.[140] When testifying concerning proposed fair housing legislation, the Chairman of this Commission stated:

> In fiscal year 1974, the total combined Title VIII fair housing appropriation for HUD and the Department of Justice was $6.2 million. In fiscal year 1977, this figure was $7.2 million. Today, the projection for fiscal year 1979, notwithstanding the impact of inflation and the unceasing need for greater fair housing enforcement efforts, is still only $11.2 million for both agencies. Even when all other fair housing programs and agencies are included, the figure is only $17.4 million. If we compare [the Government's fair housing budget] with the more than $300 million which we currently spend on the enforcement of equal employment laws, it is clear that the Federal Government has given a very low priority to the enforcement of fair housing.[141]

D. Training and Evaluation

HUD has not ensured that its staff have received adequate equal opportunity training.[142] Not only have junior civil rights staff been poorly trained, but sometimes the equal opportunity directors in area offices and even the directors in Regional Offices of Fair Housing and Equal Opportunity have also not received proper training.[143] Moreover, in two regions, HUD program staff assigned to work on the community development block grant program have had to conduct equal opportunity reviews of program applications because the number of equal opportunity staff has been inadequate to accommodate the workload; however, these program staff members have generally not received training for conducting such reviews.[144]

In fiscal year 1977, HUD's central office conducted two workshops to train regional compliance staff in Title VI requirements and one in fair housing enforcement and contract compliance. Attendance was not mandatory, however, and not all equal opportunity staff at the regional level attended, including some of the assistant regional administrators for fair housing and equal opportunity.[145] No area office personnel were in attendance.

The Field Support and Evaluation Division of regional offices is responsible for training area office staff. However, regional staff responsible for training are themselves sometimes poorly trained and area staff have reported that their requests for training have not been adequately met. HUD reports indicate that the poor training of field staff has had such consequences as:

- HUD area office staff did not provide technical assistance to prospective recipients until after they had submitted their applications for the block grant program.[146]
- Equal opportunity staff in one area office did not know the difference between providing technical assistance to a locality and monitoring its compliance with equal opportunity requirements under the block grant program.[147]

To assure that fair housing policy directives are being carried out, field office activities must be regularly reviewed. As of November 1977, HUD's latest series of field evaluation reports were dated from April 1976 through August 1977. These reports were frequently too superficial. For example, although the annual evaluation of one office observed "marked variations" in the field offices visited and a "strained relationship" between equal opportunity staff and staff administering the community development block grant program, the report did not elaborate on these findings, suggesting only the following:

[140] The Government's inadequate fair housing effort is discussed by this Commission in *To Preserve, Protect, and Defend*, p. 62.

[141] Testimony of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, on H.R. 3504 before the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights (June 7, 1978). It should be noted that the figure of $33.1 billion is total budget authority requested. This includes the total cost of long term commitments under contracts with public housing authorities and others. Actual outlays authorized for the fiscal year will be approximately one-third of this amount. Hubachman letter.

[142] Pearl interview. See also, *DOJ Interagency Survey Report*, pp. 44–51, and *HUD On-Site Operational Performance Evaluation* (Boston), p. 72.

[143] Pearl interview.

[144] *HUD On-Site Operational Performance Evaluation* (Boston), p. 78, and (Chicago), p. 67.

[145] Pearl interview and Hubachman letter. In addition, HUD has noted that in fiscal year 1977 it held two other training sessions, "Field Support and Evaluation" and "CDBG Performance Reports," which may have been directly relevant to the fair housing program; three training sessions concerning equal employment opportunity; and one concerning minority business. Hubachman letter.

[146] *HUD-On-Site Operational Performance Evaluation* (Dallas), p. 94.

[147] Ibid.

> As in other areas of FH&EO concern, marked variations were found among the field offices visited. For example, the Camden [New Jersey] Office experienced no problems in this area. A close working relationship existed between FH&EO and CPD [Office of Community Planning and Development]. Applications were processed in a timely manner and a certain amount of technical assistance was being provided to recipients. In the Newark Office which has a much heavier workload, working relationships with CPD were somewhat more strained and FH&EO processing time created internal problems. The New York Area Office, in general, processed applications in a timely manner but not with the facility found in Camden.[148]

Several reports indicated that regional offices had failed to provide adequate evaluation of and guidance to the area offices under its jurisdiction. Among the deficiencies observed in these reports were:

- Inadequate evaluation of area offices by the regional offices.
- Infrequent meetings between regional office administrators and area office staff to discuss area office responsibilities.
- A lack of understanding by area office staff as to the functions of the regional office staff.[149]

In August 1978, there was some indication that HUD planned to improve evaluation of its field offices. HUD wrote to this Commission:

> The roles of the Assistant Secretary and of Central Office staff were strengthened in HUD's recent reorganization. Technical guidance and assistance will come from the Central Office rather than from only the Regional Office, and the Central Office will have a much greater role in evaluating the performance of both Regional and Area Offices. Part of this reorganization includes development of a coordinated management and technical performance evaluation process to evaluate better Regional Office oversight and Area Office program management and operation.[150]

HUD also noted that "the Department has engaged a consultant to undertake a complete review of the FH&EO programs, procedures and organization."[151]

III. Equal Opportunity Requirements for HUD Program Participants

To further the purposes of Title VIII,[152] HUD has established equal opportunity standards which must be followed by participants in its programs.[153] Important standards are HUD's affirmative fair housing marketing regulations,[154] regulations for equal opportunity housing plans,[155] and broker certification requirements.[156]

A. Affirmative Fair Housing Marketing Regulations

In February 1972 HUD instituted affirmative marketing procedures which required developers and sponsors[157] applying for participation in HUD-subsidized or unsubsidized housing programs to submit an affirmative marketing plan before their applications could be approved.[158] The regulations were innovative. Rather than a simple assurance that the applicant would not discriminate, as is often required in applications for participation in Federal programs, they required developers and sponsors to "carry out an affirmative program to attract buyers or tenants of all minority and majority groups." HUD's action predated that of other Federal agencies—the Farmers Home Administration did

[148] *HUD On-Site Operational Performance Evaluation* (New York), p. 75.
[149] *HUD On-Site Operational Performance Evaluation* (Chicago), p. 71, (Atlanta), p. 87, and (Kansas City), p. 56.
[150] Hubachman letter.
[151] Ibid.
[152] 42 U.S.C. § 3608(a) (1970).
[153] In addition to the equal opportunity standards discussed in this section, HUD has issued equal opportunity requirements under the community development block grant program, which are discussed in section VI, below.
[154] 24 C.F.R. § 200.600–.640 (1977).
[155] 24 C.F.R. § 882.204(b)(1) (1977).
[156] Two other standards are "housing elements" and site selection standards. Under the "701" Comprehensive Planning Assistance program, a grant recipient must submit a "housing element" as part of the application for assistance. The required housing element is "to promote the realization as soon as feasible of the goals of a decent home and a suitable living environment for every American family. . ." The housing element requires each grantee to review its proposed housing strategies and their effect to assure that such strategies are carried out in a nondiscriminatory manner. Where evidence of the effects of housing discrimination is identified, the housing element must contain "specific plans, policies and procedures to eliminate such discrimination." (24 C.F.R. § 600.70 (1977).) Additionally, HUD has established site and neighborhood standards for proposed sites for new construction projects. Basically, such standards dictate that subsidized housing must be located in such a manner as to: (a) prevent the undue concentration of minorities; (b) prevent the undue concentration of assisted persons in areas containing a high proportion of low-income persons; (c) be accessible to health, recreational, commercial, transportation, and other services; and (d) comply with Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Order 11,063, and HUD regulations pursuant thereto. (24 C.F.R. § 880.112 (1977).)
[157] Sponsors are nonprofit groups which submit proposals for funds and insurance under major HUD housing programs and local, regional, and State agencies applying for community planning and development grants and loans.
[158] 24 C.F.R. § 200.600–.640 (1977). Applicants must submit affirmative marketing plans when they develop five or more dwelling units under the FHA housing program during the year preceding the application.

not issue affirmative marketing regulations until December 1972 and the Veterans Administration did not issue affirmative marketing requirements until 1977.[158] In addition, in August 1974 HUD wrote to this Commission, "HUD has in preparation a regulation establishing compliance standards and procedures for Affirmative Fair Housing Marketing Plans and expects to publish it in final form shortly."[160]

In 1975 HUD amended its affirmative marketing regulations to reflect Title VIII's prohibition against sex discrimination.[161] Under the regulations, developers and sponsors agree:

- To prepare a written plan detailing the affirmative marketing procedures they will follow in soliciting buyers and tenants.[162]
- That neither the builder nor any agent of the builder will decline to rent or sell any HUD-subsidized housing to a prospective purchaser because of his or her race, color, sex, religion, or national origin.[163]
- To apprise minority and female homebuyers of the availablity of the housing offered.[164]
- To maintain a nondiscriminatory hiring policy and provide all marketing staff with written instructions on and training in affirmative marketing.[165]
- To display prominently the equal housing opportunity poster in each place of business where HUD-appraised or approved housing is offered for sale.[166]
- To incorporate the equal housing opportunity logotype,[167] slogan, or statement, as outlined in the HUD Advertising Guidelines for Fair Housing,[168] in all advertising.[169]
- That noncompliance with the foregoing requirements will make the applicant liable to sanctions, including but not limited to denial of further participation in departmental programs and referral to the Department of Justice for suit by the United States for injunctive or other appropriate relief.[170]

In addition, an important requirement is for the developers and sponsors to state in their plans the anticipated results of the plan in terms of the number or percentage of dwelling units they will sell or rent to minorities.[171] If fully implemented, this requirement could be an important tool in the realization of equal housing opportunity, just as the use of goals and timetables is important in the area of employment. Elaborating on this requirement, HUD has stated that:

> HUD does not consider the statement of anticipated results to establish a racial quota governing project occupancy nor a goal which must be reached to comply with the HUD regulation. HUD determinations of compliance with the provisions of the approved plan are made on the basis of whether a good faith effort to fulfill the provisions of the plan and to comply with the regulations has been made and not whether implementation of the plan has resulted in the achievement of the anticipated results stated.[172]

1. Approval of Plans

HUD states that it is "difficult or impossible to ascertain how many affirmative fair housing marketing plans are presently in operation because of the nature of HUD's housing programs."[173] Since 1975,

[158] The Veterans Administration and Farmers Home Administration affirmative marketing requirements as of early 1978 are discussed below in chapters on these agencies.
[159] Hubschman letter.
[161] 24 C.F.R. § 200.600-.640 (1977).
[162] 24 C.F.R. § 200.625 (1977). HUD observed:
> HUD Affirmative Fair Housing Marketing (AFHM) Regulations are designed to assure that individuals of similar income levels in the same housing market area have a like range of housing choices regardless of their race, color, religion, sex or national origin. In this respect, HUD requires that AFHM plans must contain an advertising and community relations program directed to reach persons who traditionally would not be able to apply for housing. Hubschman letter.

[163] 24 C.F.R. § 200.610 (1977).
[164] 24 C.F.R. § 200.620(a) 1977).
[165] 24 C.F.R. § 200.620(c) (1977).
[166] 24 C.F.R. § 200.620(e) (1977).
[167] The Equal Housing Opportunity logotype is an often-used symbol, reproduced in HUD's fair housing poster, signifying nondiscriminatory practices by the displayer.
[168] 24 C.F.R. § 200.620(e) (1977) and 40 Fed. Reg. 20079 (May 8, 1975).
[169] 24 C.F.R. § 200.620(e) (1977).
[170] 24 C.F.R. § 200.635 (1977). HUD Form 935.2 (1976) and Hubschman letter. Note: this requirement does not appear in HUD affirmative marketing regulations but does appear in the HUD affirmative fair housing marketing plan form which builders and developers submit to HUD. The affirmative marketing plan is also to be aimed at nonminorities as a target group for housing in predominantly minority areas.
[171] This Commission's endorsement of goals and timetables is set forth in U.S. Commission on Civil Rights, *Statement on Affirmative Action* (1977), p. 6.
[172] Hubschman letter.
[173] HUD wrote to this Commission:
> For example, the AFHM plans are approved at the time a "firm commitment" for mortgage insurance is given prior to actual construction. If construction is initiated, the plan remains in operation for the duration of the mortgage. However, construction may never be started or it may be delayed. Some builders do not secure the necessary funds to construct the housing, while others may secure a commitment only for credit purposes and construct the housing using conventional financing. Hubschman letter.

according to HUD records, about 23,000 plans have been reviewed for approval.[174] Although the central FHEO office keeps no record of the number of plans in operation,[175] HUD reviews of regional office performance indicate great disparity in the acceptance rates. For example, the area offices within the Atlanta Regional Office jurisdiction had approval rates varying from 40 to 60 percent. One of the area offices reporting to the Seattle Regional Office approved about 63 percent of the affirmative fair marketing plans submitted, while another area office reporting to Seattle initially accepted only 20 percent of all plans.[176] While the differences might be due to the quality of the plans, the differences might also be due to standards followed by area offices. HUD reports in its *On-Site Operational Performance Evaluation* of the New York Regional Office that "some [affirmative fair housing marketing plan] approvals were perfunctory on the part of FHEO without consideration for insistence on conditions which would aid in providing equal opportunity."[177]

2. *Onsite Reviews*

The Need for Reviews

According to HUD's *Guide to Evaluating Affirmative Fair Housing Marketing Plans,* the "primary indicator of whether the [affirmative fair housing marketing] plan is effective or not, of course, is whether the target group occupancy level is achieved."[178] A 1976 HUD-funded study in 15 cities, including 145 participants in HUD programs, emphasized the need for frequent monitoring of occupancy targets as well as other aspects of the plans. The study found that 50 percent of all HUD developers and sponsors surveyed reported that "the most frequent shortcoming in the implementation of the [affirmative fair housing marketing] plan was the failure to reach minority occupancy goals."[179] The developers and sponsors surveyed contended that this result occurred because HUD failed to provide referral lists to developers indicating the names of potential applicants for assisted housing.[180]

HUD wrote to this Commission:

> HUD notes that while it contemplates a review of the status of developers and sponsors in meeting their Affirmative Fair Housing Plans as part of the compliance review, it does not agree that it should be responsible for supplying the names of potential applicants for assisted housing. This would require a staff intensive effort which would diminish HUD's limited staff capacity. Just as the EEOC does not refer job applicants as part of its civil rights mission, HUD cannot be expected to provide housing developers with the names of housing applicants.[181]

This Commission concurs that it is not the best use of staff resources for HUD to prepare lists of housing applicants. However, HUD does not appear to have made clear to the public, or even to its own staff, the responsibility that rests on builders and developers for soliciting applicants and the limits of HUD's role in this regard. As shown in the 1976 HUD-funded study, many developers expect HUD to provide lists of potential applicants. Indeed, 20 percent of the 100 developers and sponsors surveyed received referrals from HUD. Even the authors of the HUD-funded study appeared not to be aware of HUD's own perception of the role of HUD regional offices, having criticized HUD by stating, "In four HUD area offices occupant referral lists were not routinely maintained."[182]

Although 50 percent of developers and sponsors reported in the survey that the affirmative fair housing marketing plan increased their knowledge of the fair housing laws, 50 percent suggested that the plans represent "paperwork" and were not helpful in overall marketing to minorities.[183] The study also showed that HUD's advertising guide-

[174] Laura Spencer, Director, Fair Housing Enforcement, HUD, memorandum to Michael Hatfield, U.S. Commission on Civil Rights, Dec. 14, 1977, responding to a Title VIII questionnaire submitted by Commission staff to the Office of Fair Housing and Equal Opportunity, HUD (hereafter cited as Title VIII response).

[175] Ibid.

[176] *HUD, On-Site Operational Performance Evaluation* (Seattle), p. 86. In fiscal year 1977, the HUD central office conducted performance evaluations of all 10 regional offices. These evaluations were not identical in their focus. Thus, for example, the number of approved plans was not considered in each evaluation.

[177] *HUD, On-Site Operational Performance Evaluation* (New York), p. 73.

[178] U.S., Department of Housing and Urban Development, Office of Policy Development and Research, *HUD Guide to Evaluating Affirmative Fair Housing Marketing Plans,* vol. III, p. 36 (December 1975). There is some indication that HUD's commitment to using this indicator is decreased. In August 1978, HUD wrote to this Commission urging that this report "be revised to delete any statements which would indicate that the primary indicator of effectiveness of affirmative marketing used by HUD is the attainment of the anticipated result of the plan." Hubschman letter. HUD's *Guide to Evaluating Affirmative Fair Housing Marketing Plans* had been revised or withdrawn.

[179] *Jaclyn Inc., A Study to Determine the Extent of Compliance Among Developers/Sponsors with Advertising Guidelines for Fair Housing and Affirmative Fair Housing Marketing Regulations* (July 1976), p. 13 (hereafter cited as Jaclyn study).

[180] Ibid.

[181] Hubschman letter.

[182] Jaclyn study, p. 24.

[183] Ibid., p. 13.

lines for fair housing were not widely followed. Advertisements of HUD developers and sponsors, the study indicated, were in compliance with fair housing advertisement guidelines more frequently than those of developers who did not participate in HUD programs. However, the study showed that only 41 percent of advertisements placed by developers and sponsors were found to be in compliance with the HUD guidelines. Only 14 percent of advertisements placed by developers who were not participants in HUD programs were in compliance.[184]

HUD Efforts

In conjunction with approval of affirmative fair housing marketing plans, HUD area offices are to conduct onsite visits to determine the validity of the information. In at least two regions such onsite monitoring was insufficient. In the Atlanta region, no monitoring was conducted by area offices in fiscal year 1976.[185] In the Seattle region, only 13 plans were subjected to onsite monitoring by area offices, representing 3 percent of all plans received in that year.[186]

On the basis of problems discovered through monitoring, area office staff may request regional office staff to conduct compliance reviews. These compliance reviews have also been seriously inadequate. In fiscal year 1977, only 63 compliance reviews were conducted nationwide. These reviews represent less than 0.3 percent of all affirmative fair housing marketing plans approved by the Department since 1975 and less than 0.7 percent of the 9,378 plans approved in fiscal year 1977.[187]

A 1976 HUD-sponsored study summarized the inadequacies of the Department's affirmative fair housing marketing (AFHM) program:

- The ability of HUD equal opportunity personnel to evaluate affirmative marketing plans is often hampered by their inadequate understanding of the process of marketing planning in the housing industry.
- The ability of developers to formulate effective AFHM plans is often impeded by their inadequate understanding of affirmative marketing requirements and their unguided approach to AFHM plan development.
- The evaluation of AFHM plans by HUD equal opportunity personnel has often been focused on a determination as to whether or not all information requested on the AFHM plan is present, rather than on the probable effectiveness of the plan.
- Onsite monitoring of the AFHM plan implementation was generally inadequate in terms of frequency and focus.
- The AFHM plan currently used does not permit the collection of appropriate data required either to guide developers to formulate effective plans or to provide for a reasonable assessment by HUD equal opportunity personnel of the probable success of AFHM plans.
- Developers are not timely in submitting monthly occupancy and sales reports as required under AFHM regulations and they frequently display, through the superficiality of their plans, an apparent indifference to AFHM requirements.
- There was no evidence that use of one or any combination of generic types of media, e.g., newspaper, radio, could be expected to produce better affirmative marketing results than another type or combination of types.[188]

B. Equal Opportunity Housing Plans

Equal opportunity housing regulations are an essential element for the successful operation of HUD's program for subsidizing rents in existing housing under Section 8 of the United States Housing Act of 1937, as amended by Title II of the Housing and Community Development Act of 1974.[189] Under this program, families that have been certified by local public housing authorities (PHAs) as eligible for participation are responsible for finding their own housing. Once housing which is acceptable to both the family and the local public housing authority[190] has been located, the rent subsidies are paid by the PHA directly to the owner of the housing. The Section 8 program thus, in effect, supplements the amount of money that low-income families can spend on housing and should enable them to afford housing outside low-income

[184] Ibid.
[185] *HUD On-Site Operational Performance Evaluation* Atlanta), p. 69.
[186] *HUD On-Site Operational Performance Evaluation* (Seattle), p. 86.
[187] Title VIII response.
[188] U.S., Department of Housing and Urban Development, *Affirmative Fair Housing Marketing Techniques: Final Project Project*, vol. I, *Office of Policy Development and Research* (January 1976), pp. 9-13.
[189] 42 U.S.C. § 1437f (Supp 1975).

[190] Although gross rents generally cannot exceed fair market rents (FMR), a PHA can approve rents 10 percent above the FMR for 20 percent of its units. In addition, when necessary, a HUD area office can approve rents up to 120 percent of the FMR for specified units, neighborhoods, or an entire locality. 24 C.F.R. § 882.106(a)(4) (1977). Hubachman letter. The fair market rent is the amount of rent HUD has determined as necessary to obtain privately owned, existing, decent, safe, and sanitary rental housing of modest nature with suitable amenities. 24 C.F.R. § 882.102 (1977).

neighborhoods. The program should operate to expand housing opportunities for low-income families.[191]

However, to the extent that discrimination on the basis of such factors as race, national origin, sex, or public assistance as a source of income is a barrier to expanded housing opportunities, the increased amount of money may be of little use to families who are attempting to locate suitable housing outside of low-income or minority neighborhoods. Where discrimination is practiced, the program offers no direct incentive or deterrent which might influence owners to alter present patterns of housing segregation.

HUD equal opportunity regulations pursuant to Section 8[192] appear to be an attempt, at least in part, to resolve this dilemma. The regulations require that each public housing authority participating in the program submit a written Equal Opportunity Housing Plan to HUD. Among the most important required contents of the plan are policies and procedures for:

- Ensuring that housing for eligible families can be found "in areas outside low-income and minority concentrations and outside the local jurisdiction where possible."[193]
- Assisting certificate holders to find suitable housing when discrimination has prevented them from finding such housing.[194]

These regulations, however, fail to contain adequate provisions which require PHAs to use all possible means to ensure that the program does not reinforce existing discriminatory practices. Among the specific deficiencies of the regulations are:

- PHA efforts to secure participation of owners outside areas of minority concentration are required only "where possible."
- PHAs are not instructed to investigate and resolve complaints of discrimination against owners who are participating in the rent subsidy program.
- PHAs are not instructed that, when they receive a complaint of discrimination which they cannot resolve voluntarily, they must refer that complaint to HUD or to a State or local agency with authority to resolve the matter.
- When an owner denies housing to a certification holder because of race or sex, the PHA is not instructed to ensure that the owner be barred altogether from participation in the rent subsidy program.

HUD has commented that:

> The success of the PHA's efforts cannot be guaranteed because owner participation is voluntary. . . .HUD disagrees with the statement that PHAs should be required "to investigate and resolve complaints of discrimination against owners. . . ." A PHA is not the proper agency to investigate and resolve complaints, principally because its bias often is to make as few waves as possible in dealing with owners whose participation in the program a PHA works to achieve. PHA staff have expressed the fear that formal complaints against owners would have the effect of drying up housing resources.[195]

Thus, there is no mechanism to ensure that only owners who are in compliance with Federal equal opportunity requirements are permitted to partici-

[191] 42 U.S.C. § 1437f(a) (Supp. V 1975). HUD has observed that:

> Vacancy rates and characteristics of the housing market (i.e., availability of certain sizes of units) greatly affect the availability of housing units which meet the Fair Market Rent levels. The Fair Market Rent itself is an important factor in determining unit availability on a geographic basis. Hubschman letter.

[192] 24 C.F.R. § 882.204(b)(1) (1977). The new construction and substantial rehabilitation programs also require compliance with equal opportunity requirements, including site and neighborhood standards. 24 C.F.R. §§ 880.112 and 881.112 (1977).

[193] 24 C.F.R. § 882.204(b) (1977). This provision complements HUD regulations for the Housing Assistance Plan (HAP). The HAP regulations require applicant communities to participate in areawide or metropolitan-wide spatial deconcentration of housing opportunities for lower income persons. 43 Fed. Reg. 8466 (Mar. 1, 1978) to be codified in 24 C.F.R. § 570.306 (1977). Under the HAP regulations, those communities in an SMSA with the smallest proportion of lower income populations are required to make the greatest effort in that SMSA to provide assisted housing. Housing Assistance Plan requirements are discussed in the section of this report on the Community Development Block Grant Program.

[194] 24 C.F.R. § 882.204(b)(1)(i) (1977). HUD stated:

> [PHA's have other obligations], such as the requirement that a PHA must provide certificate holders a "full explanation" of "the general locations and characteristics of the full range of neighborhoods in which the PHA is able to execute contracts and in which units of suitable price and quality may be found.". . .The Section 8 regulations also require that certificate-holders be briefed on Federal, State, and local fair housing laws and that "FAIR Housing, U.S.A. (HUD 63–EO) be included in the family's information packet" (§ 882.209(b)) and (c). The Section 8 regulations (§ 882.111) and the Equal Opportunity Housing Plan (7420.3, ch. 9) specifically require PHAs to administer the program in an affirmative manner. . .Moreover, HUD's revised Section 8 Handbook, 7420.3, Rev-2, at page 9–5, offers guidance to PHAs on possible outreach efforts to achieve broad geographical participation by landlords. Page 9–9 of the Handbook provides specific instructions for a PHA to advise a family of its rights under Title VIII. A PHA also is required to offer a family assistance in filling out the applicable complaint forms or to refer the family to the HUD Area Office or a local fair housing group. . .PHAs are required to encourage persons who believe they may have encountered discrimination to file with both HUD and a local or State agency, especially where local or State fair housing ordinances provide injunctive relief, or where the local or State enforcement agency has a good record. Hubschman letter.

[195] Hubschman letter.

pate in the Section 8 program. If HUD does not believe that responsibility for ensuring compliance rests with the PHAs, it could assume that role itself. In the view of this Commission, pursuant to Title VI of the Civil Rights Act of 1964, if an owner is rejecting minorities because of race, the owner should not be permitted to receive subsidies for nonminority tenants.

HUD has observed that:

> The Section 8 Existing Program has provided expanded housing opportunities, and we are exploring means for expanding these opportunities. One possible method would be to amend the existing regulations to encourage utilization of the existing program on a Regional or SMSA basis, rather than on the current basis, i.e., "in any area where the PHA determines that it is not legally barred from entering into (HAP) contracts" (24 CFR 882.103).[196]

Several evaluations of HUD's program fail to support HUD's assertion that housing opportunities have been expanded. As of December 1976, for example, only 46 of 521 families participating in the Section 8 existing program administered by the Philadelphia Housing Authority had moved from minority-concentrated areas into nonminority areas.[197] In Winston-Salem, North Carolina, 70 percent of all blacks who received assistance under the Section 8 existing program remained in census tracts that were at least 90 percent black.[198]

HUD has commented that:

> The fact that only a small number of families moved does not prove conclusively that this reflects a lack of choice, but is consistent with concept of "Finders Keepers" under 24 CFR 882.103 and 882.204. There may also have been a financial incentive, as where the tenant negotiated a better rent, to the benefit of the tenant and the Government.[199]

However, HUD's conclusion is not supported by the results of a a study conducted in Cuyahoga County (Cleveland), Ohio.[200] The study revealed that the Section 8 program did not achieve the goal of expanded housing opportunities for low- and moderate-income families. The study found that 63 percent of those families who benefited from the rent subsidy program remained in the locations in which they had lived before receiving the subsidy. It indicated also that most white families searched for housing in their immediate neighborhoods, but that black families most often looked outside their immediate neighborhoods, possibly indicating that minorities were more dissatisfied than whites with the neighborhoods in which they lived. However, despite their desire to move, minority families were less likely than white families to locate suitable housing in a neighborhood that was more desirable than their current one.[201]

C. Broker Certification

HUD and the Veterans Administration both require that brokers participating in the sale or management of acquired properties sign nondiscrimination certifications.[202] Because in many instances the two agencies do business with the same brokers, they have developed a joint certification which is accepted by both agencies.[203] By signing the certification, brokers essentially agree not to violate Title VIII of the Civil Rights Act of 1968 or Executive Order No. 11,063 and promise to take affirmative steps to practice fair housing in marketing all of their properties.[204]

There are a number of deficiencies in HUD's implementation of the certification requirement:

- HUD, like VA, does not require brokers to report on their activities to comply with the certification. In contrast, the Farmers Home Administration, which may also do business with the same brokers, requires regular reporting.
- HUD has no system for regular onsite review of broker compliance with the certification.[205]
- Although the certification requires brokers to market affirmatively all of the properties they list and not merely HUD and VA acquired properties, HUD in 1976 ceased requiring that individual sales brokers make use of the minority media to advertise all properties in white areas.[206]

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[196] Ibid.
[197] See section on "Community Development Block Grant" program.
[198] *HUD Grantee Performance Report*, Winston-Salem, North Carolina (April 1977).
[199] Hubechman letter.
[200] Joseph H. Buttle and Associates, *The Section 8 Program For Existing Housing in Cuyahoga County* (1977).
[201] Ibid.
[202] Joint HUD-VA Nondiscrimination Certification, HUD Form 9681, April 1973; pursuant to 24 C.F.R. § 200.620 (1977).
[203] Ibid.
[204] The contents of this certification are discussed in greater detail in the chapter in this report on the Veterans Administration.
[205] Laura Spencer, Director, Fair Housing Enforcement, HUD, telephone interview, Jan. 9, 1978, and Hubechman letter.
[206] Spencer telephone interview.

• HUD has not trained its staff on the broker certification requirements.[207]

IV. Administration of Title VIII

A. Regulations

Regulations and guidelines serve as the principal means by which agencies interpret and clarify substantive provisions of law, while at the same time advising the public as to how the law will be procedurally enforced. In defining the scope of illegal discrimination, courts have given great deference to the administrative interpretation of an act through rules and regulations adopted by the enforcing agency.[208]

HUD, however, has failed to fulfill its responsibility as the lead agency[209] under Title VIII to issue adequate interpretations of Title VIII. Additionally, HUD has failed to carry out its responsibility under Title VIII to administer its programs in an affirmative manner. Affirmative marketing regulations represent one of HUD's most significant efforts to implement the affirmative mandate pursuant to Title VIII. The National Committee Against Discrimination in Housing states: "This [affirmative marketing] is virtually the only unbashedly *affirmative* program at HUD (despite the Title VIII mandate that all HUD programs are to be administered affirmatively). HUD's record in Affirmative Marketing is unbelievably bad; bad even by HUD standards."[210] In the 10 years since Title VIII was passed, HUD has issued only the following few regulations and formal guidelines pursuant to that statute:

• Complaint processing procedures.[211]

• Requirements for the display of the fair housing poster (exhibit 1.3).[212]

• Advertising guidelines.[213]

• Affirmative fair housing marketing requirements.[214]

• Regulations authorizing the collection of data on race, sex, and national origin.[215]

• Criteria for the recognition of State and local agencies.[216]

• Procedures for fair housing administrative meetings under Title VIII.[217]

For the most part, these regulations relate to "procedural" concerns, such as the complaint process and the fair housing poster and not to substantive or interpretative concerns which establish standards of conduct under the statute.[218] HUD's affirmative fair housing marketing regulations[219] represent the Department's most substantive Title VIII regulations.

As of August 1978, HUD had not issued regulations pertaining to Section 804 of Title VIII, "Discrimination in the Sale or Rental of Housing"; Section 805, "Discrimination in the Financing of Housing"; Section 806, "Discrimination in the Provision of Brokerage Services"; and Section 808, "Administration," which delegates chief authority to the Secretary of HUD for the administration of Title VIII.

Specifically, there are a number of areas in which Federal guidance is needed as to what constitutes discrimination prohibited by Title VIII.

• *Discrimination in lending.* HUD's regulations do not cover those practices and policies, such as redlining and certain credit standards, that are neutral on their face but can be discriminatory in effect.

• *Discrimination in policies and practices by real estate brokers.* HUD does not describe those real estate practices such as steering and blockbusting[220] which are discriminatory. Moreover, except

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[207] Ibid.

[208] For example, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court of the United States gave great weight to the Equal Employment Opportunity Commission's Guidelines on Employment Testing Procedures. Similarly, in the area of public school education in Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court adhered to a Department of Health, Education, and Welfare memorandum on providing educational services in school districts with sizable language minority populations.

[209] Section 808(d) of Title VIII states that: "all executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title and shall cooperate with the Secretary [of HUD] to further such purposes." 42 U.S.C. § 3608(c).

[210] Ernest Erber, Director, Research and Program Planning, National Committee Against Discrimination in Housing (NCDH), telephone interview, June 23, 1978.

[211] 24 C.F.R. § 105 (1977)—Fair Housing.

[212] 24 C.F.R. § 110 (1977)—Fair Housing Poster.

[213] 24 C.F.R. § 200.620(e) (1977) and 40 Fed. Reg. 20,079 (May 8, 1975).

[214] 24 C.F.R. § 200-Subpart M (1977)—Affirmative Fair Housing Marketing Regulations.

[215] 24 C.F.R. § 100 (1977)—Racial, Sex, and Ethnic Data.

[216] 24 C.F.R. § 115 (1977)—Recognition of Substantially Equivalent Laws.

[217] 24 C.F.R. § 106 (1977)—Fair Housing Administrative Meetings Under Title VIII of the Civil Rights Act of 1968.

[218] HUD has commented:

> While it is technically accurate that there has been no specific authority providing substantive interpretations of Sections 804, 805, 806 and 808 of Title VIII. . .[the regulations of complaint processing and the fair housing poster] affect all persons subject to the provisions of the Civil Rights Act of 1968. Hubschman letter.

[219] 24 C.F.R. § 200—Subpart M (1977).

[220] Steering is used by real estate agents to direct persons of one racial or ethnic origin to housing in neighborhoods with the same ethnic or racial origin. Blockbusting is used by real estate speculators to accelerate the sale of housing by circulating rumors that unwelcomed minorities have purchased or rented housing in a neighborhood and will soon overwhelm

to those brokers with whom HUD does business,[221] HUD provides no guidance to brokers on affirmative steps for practicing fair housing.

• *Discriminatory practices and policies of local government.* HUD has not set standards for determining when exclusionary zoning practices, though neutral on their face, are discriminatory in effect and prohibited under Title VIII. As interpreted by a Federal appellate court in *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights,* [222] barriers to the provision of housing for low- and moderate-income families in certain sections of cities and suburbs, or even in entire communities, can perpetuate segregation and impede the achievement of national housing objectives.[223]

• *Discrimination in appraisal practices and policies.*

• *Discrimination in property insurance practices and policies.*

• *Affirmative remedies for past discrimination and assurance against future discrimination.*

• *Standards of proof necessary to establish unlawful discrimination.*

• *Rejection of applicants for rental housing because the source of their income is public assistance or alimony.* Such rejection can have a discriminatory effect upon minorities and women, as for example, where minorities or women who head households are represented in a higher proportion among those receiving public assistance than in the population in general. It can also be a facade for overt discrimination.[224]

In August 1978, HUD wrote to this Commission that it planned to resolve this problem. HUD stated:

For some time FH&EO has been engaged in the development of a comprehensive regulation implementing Section 805 of Title VIII, which would not only cover all federally-regulated financial institutions, State regulated banks, insurance companies and other lenders, but also impact most HUD-approved mortgagees and other entities receiving HUD assistance.

In addition, since the Statutory Guidelines for Fair Housing, as originally issued on April 1, 1972 (37 FR 6700) and amended May 8, 1975 (40 FR 20079), do not provide specific guidance as to their use in assuring compliance with the nondiscrimination requirements of Title VIII regarding complaints of sex discrimination and of advertising practices and policies under the Act, particularly under Section 804(c), the Department has prepared a comprehensive revision to the guidelines. The revision will take into account the amendment of the statute prohibiting sex discrimination and make other revisions needed for the effective application of the Guidelines to Title VIII fair housing matters.

The current Assistant Secretary for Fair Housing and Equal Opportunity and the current General Counsel are aware of the need to develop a system for issuing interpretations and opinions on Title VIII and are currently engaged in developing an approach to meet this need.[225]

B. Complaint Processing

1. General

HUD's principal Title VIII activities are the investigation and resolution of complaints,[226] a

it. The blockbuster's objective is to precipitate a drop in prices which will enable him or her to purchase properties in a neighborhood and resell them to minorities at inflated prices. Charles Abrams, *The Language of Cities* (Viking Press, 1971), p. 25. Note: This is not to be confused with the right of minority brokers to solicit listings by legitimate business practices in predominately white neighborhoods. HUD notes that there are:

> A number of unlawful practices commonly associated with [the terms steering and blockbusting,] (e.g., refusals to advise persons of housing available in certain areas, unfavorable descriptions of certain communities or subdivisions, and efforts by brokers to solicit listings in certain neighborhoods based on race, color, national origin, religion or sex of persons purchasing or renting dwellings). Hubachman letter.

[221] HUD requires those brokers with whom it does business to sign a certification of nondiscrimination. This certification is discussed below.

[222] Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

[223] See Urban League of Greater New Brunswick v. Mayor and Council of the Borough of Carteret, 142 N.J. Super. 11 (Ch. Div. 1976), and Southern Burlington County NAACP v. Mt. Laurel Township, 67 N.J. 15., *cert. den.* 423 U.S. 808 (1975).

[224] For example, in a study in Cuyahoga County (Cleveland), Ohio, 53 percent of black homeseekers reported that they were denied housing on the grounds that they were participants in HUD's rent subsidy program. In contrast, none of the white participants in HUD's rent subsidy program reported being denied housing because they were participants in the program. Joseph H. Bettle and Associates, *The Section 8 Program For Existing Housing in Cuyahoga County* (1977).

[225] Hubachman letter. HUD noted that there are:

> a number of Departmental program regulations which contain fair housing criteria for the approval of applications for HUD funds (e.g., Water and Sewer Facilities Grants 24 CFR 556, Public Facilities Loans 24 CFR 561, Neighborhood Facility Grants 24 CFR 551, Open Space Land Projects 24 CFR 541, Comprehensive Planning Assistance 24 CFR 600). Further, other HUD regulations are designed to provide HUD program participants with guidance concerning the provision of fair housing in the administration of projects and activities. (Community Development Block Grant regulations (24 CFR 570) for Housing and Community Development Programs, the site and neighborhood and affirmative marketing regulations in the Section 8 housing programs (24 CFR 800 and 881) and HUD project selection criteria (24 CFR 200.700). Ibid.

These regulations set forth fair housing requirements for the administration of HUD programs rather than guidance to other Federal agencies for the operation of their programs.

[226] Spencer interview, Jan. 12, 1978.

EXHIBIT 1.3

EQUAL HOUSING
OPPORTUNITY

We Do Business in Accordance With the Federal Fair Housing Law

(Title VIII of the Civil Rights Act of 1968, as Amended by the Housing and Community Development Act of 1974)

IT IS ILLEGAL TO DISCRIMINATE AGAINST ANY PERSON BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

- In the sale or rental of housing or residential lots
- In advertising the sale or rental of housing
- In the financing of housing
- In the provision of real estate brokerage services

Blockbusting is also illegal

An aggrieved person may file a complaint of a housing discrimination act with the:

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Assistant Secretary for Fair Housing and Equal Opportunity
Washington, D.C. 20410

HUD-928.1 (7-75) Previous editions are obsolete

EXHIBIT 1.4

HUD Title VIII Complaint Handling

	1973	1974	1975	1976*	1977
Number of complaints received	2,763	2,602	3,167	4,121	3,391
Number of complaints carried over from previous year	1,293	1,680	1,092	1,684	1,018**
Total workload	4,056	4,282	4,259	5,805	4,409
Number of complaints closed	2,376	3,190	2,575	4,801**	2,982
Number of attempted conciliations	363	610	651	1,170	530
Number of successful conciliations	207	351	355	670	277

*Includes the transition quarter.

**Due to an adjustment made when HUD data processing was automated, the sum of these two numbers exceeds HUD's 1976 fiscal workload by 14.

Note: Through June 1976, fiscal years ran from July 1 of one year to June 30 of the next. The Congressional Budget and Impoundment Control Act of 1974 established new congressional budget procedures and a new fiscal year period, from October 1 through September 30, beginning with fiscal year 1977. The period between July 1, 1976, and September 30, 1976, is known as the transition quarter. The Congressional Budget and Impoundment Act of 1974, § 1020, 31 U.S.C. § 2617 (1974).

Sources: U.S., Department of Housing and Urban Development, response to U.S. Commission on Civil Rights Inquiry, 1977, and Karen Zuniga, Fair Housing and Equal Opportunity, Department of Housing and Urban Development, telephone interview, Aug. 30, 1978.

largely ad hoc approach to the prevention and elimination of housing discrimination.[227] Complaints received totaled 3,123 in fiscal year 1976[228] and 3,391 in fiscal year 1977 (see exhibit 1.4).[229] The Department expects the total number of complaints for fiscal year 1978 to equal that of fiscal year 1977.[230]

While most of the complaints HUD receives allege racial discrimination, a small number of them claim discrimination based on sex or national origin. In fiscal year 1977, 344 of the 3,391 complaints alleged discrimination based upon sex, 275 from females and 69 from males.[231] In calendar year 1975,[232] 355 such complaints were received, 313 from females and 42 from males. Also in fiscal year 1977, 174 complaints alleged discrimination against Hispanics. In addition, there were 60 complaints from American Indians, 3 from Asians, and 119 classified as "other." There were 154 Hispanic complaints in calendar year 1975, 64 from American Indians, 17 from Asians, and 82 from "others."[233]

In a 1977 HUD internal audit, HUD reported:

> Housing discrimination complaints filed with the Department by the general public as provided for in Title VIII of the Civil Rights Act of 1968, have not been processed within the time frame provided for in the law or with sufficient promptness to minimize injuries to persons affected by discriminatory housing practices. While the law allows thirty days for investigation of complaints and notification to complainants as to whether or not HUD will attempt conciliation, we found that this required an average of 122 days in 1975 and 114 days in 1976 in the four Regions included in our audit. As a result of the delays, discriminatory housing practices may have been allowed to continue for an extended period, the persons affected may have suffered undue hardships and the Department's investigation and conciliation efforts may have been made more difficult and

[227] This problem is discussed in *To Provide. . .For Fair Housing.*
[228] U.S., Department of Housing and Urban Development, response to U.S. Commission on Civil Rights Inquiry, 1977 (hereafter cited as HUD response). In fiscal year 1976, including the transition quarter, complaints received totaled 4,127.
[229] Hubechman letter.
[230] Title VIII response.
[231] Hubechman letter.
[232] Prior to fiscal year 1977, figures on the number of complaints alleging sex discrimination and discrimination based upon national origin were available only by calendar year. Title VIII response.
[233] Hubechman letter.

less successful because of the loss of contacts with principals and witnesses in cases.[234]

In the first 6 months of calendar year 1978, however, HUD reports that it had made progress in reducing its backlog of Title VIII fair housing complaints. By June 1, 1978, the number of open Title VIII cases was reduced to 505. Cases open more than 90 days were reduced to 101. On August 5, 1978, the total number of open complaints stood at 557; the number of complaints open more than 90 days had been reduced to 91.[235]

This progress in reducing HUD's backlog is significant, especially in light of the length of time the backlog has existed. HUD has also noted that:

> The Department recently hired. . .the consultant who assisted the [Equal Employment Opportunity Commission] in revising its complaint procedures, to advise the Department on ways to improve the Title VIII complaint handling process. His recommendations are currently under consideration, and improvements will be implemented within the next few months.[236]

The General Accounting Office has concluded that HUD has not been effective in resolving Title VIII complaints because HUD is unable to prove, for a major portion of the complaints it receives, whether discrimination actually occurred. GAO reviewed 322 complaints received by three HUD regions and found that the Department was unable to resolve 247 because of a lack of clear evidence of discrimination. One reason why HUD has not been able to detect discrimination, suggests GAO, is that the Department refuses to make use of "testing."[237]

HUD wrote to this Commission:

> HUD does not believe it is advisable to use Federal employees as testers. The Department, however, supports the use of testing by private organizations and citizens and continues to use the results of such testing as evidence. The recent study of housing discrimination by NCDH, funded by HUD, made extensive use of testers. Evidence of discrimination found by those testers was turned over to DOJ by HUD for use in prosecutions.[238]

This Commission, on the other hand, fully endorses testing as an investigative tool to be used by Federal agencies with fair housing responsibilities. The use of testers as an investigative tool can sometimes be the only reliable way of determining instances of housing discrimination. Indeed, many of the cases that have been litigated by the Department of Justice have been based solely on evidence produced by the use of independent testers.

There is nothing in the language of Title VIII or relevant case law that prohibits HUD from conducting testing. Section 3611(a) of the Fair Housing Act authorizes the Secretary of HUD to conduct investigations.[239] It is a well-established principle of statutory construction that a legislative grant of power carries with it the right to use all means and instrumentalities necessary to the beneficial exercise of the expressly conferred powers.[240] Both the Departments of Justice and Housing and Urban Development have used evidence supplied by independent testers in a number of lawsuits under Title VIII and that use has been upheld as a reasonable investigative device.[241]

2. *Conciliation*

Because HUD cannot prove discrimination in most cases, it can attempt to conciliate only a small portion of the complaints it receives. Over the past 5 years, HUD has failed to improve upon the rate at which it has been able to bring Title VIII complaints to conciliation. HUD reports that in fiscal year 1977, it attempted to conciliate 530 cases, representing

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[234] HUD, audit of the Dallas, Denver, San Francisco, and Seattle Regional Offices, March 1977.

[235] Hubechman letter.

[236] Ibid.

[237] General Accounting Office, *Improvements Needed in Federal Efforts to Enforce Compliance with Fair Housing Legislation* (February 1978) (hereafter cited as GAO study). The three regions studied were Atlanta, Chicago, and San Francisco. Testing is also referred to as "auditing." One fair housing/civil rights organization has described the procedure:

> An audit is a study done to determine the differences in quality, content, and quantity of information and service given to clients by real estate firms and rental property managers that could only result from a difference in the client's race. The audit is conducted under the supervision of a coordinator who sends teams of trained volunteers to well-known real estate agencies to pose as homeseekers. Each team is matched according to income, family size, age, general appearance, etc.—every factor except skin color. Each member of the team is sent to the same agency at closely spaced intervals, presenting similar housing desires. Each volunteer then keeps detailed accounts of his experience in the categories being tested, and avoids contact with his audit counterpart until his report is completed. National Neighbors, *Racial Steering: The Dual Housing Market and Multiracial Neighborhoods* (1974).

[238] Hubechman letter.

[239] 42 U.S.C. § 3611(a) (1970).

[240] Daly v. Stratton, 326 F.2d 340 (7th Cir. 1964).

[241] U.S. v. Youritan, 370 F. Supp. 643 (N.D. CA 1973), modified as to relief and *aff'd.* 509 F.2d 623 (9th Cir. 1975), and United States v. Northside Realty Associates, P.H.E.O.H. Rptr. para. 15,232 (N.D. GA 1977).

EXHIBIT 1.5

HUD Complaint Conciliations

	1973	1974	1975	1976*	1977
Percent of complaint closures in which conciliation was attempted	16	20	26	25	18
Percent of attempted conciliations which were successful	57	58	59	58	53
Percent of closures in which conciliation was successful	9	11	14	14	9

*Includes the transition quarter.

Sources: U. S., Department of Housing and Urban Development, response to U. S. Commission on Civil Rights Inquiry, 1977, and Henry A. Hubschman, Executive Assistant to the Secretary, letter to Louis Nuñez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 17, 1978.

only 18 percent of the 2,982 cases closed in that year.[242] As shown in exhibit 1.5, the percentage of complaints that went to conciliation in fiscal year 1977 was the lowest since fiscal year 1973.

Another major stumbling block in HUD's effort to administer Title VIII is the statutory necessity to rely solely upon the process of conciliation to correct Title VIII violations. Because the Department cannot file suit in court on behalf of plaintiffs[243] and does not possess cease and desist authority, its only recourse against a noncomplying respondent is to refer certain cases to the Department of Justice.[244] Thus, even when HUD has proof of discrimination, respondents may be unlikely to agree to the remedies HUD suggests because they realize that if they reject the agreement, the probability of further action against them is slight. Indeed, HUD has observed that "the limitation of HUD enforcement authority to conference, conciliation, and persuasion is a primary reason for unsuccessful resolution of complaints."[245]

Since the enactment of Title VIII, only about 10 percent of the 300 Title VIII suits filed by the Department of Justice have been the result of HUD referrals.[246] Respondents may thus be aware that, if they fail to settle, there is a strong probability that the Government will not pursue the matter further. Consequently, the lack of enforcement authority makes it very difficult for HUD to resolve the complaints it attempts to conciliate.

The inadequacy of the conciliation process, when it is unaccompanied by stronger enforcement mechanisms, is emphasized by the small number of complaints HUD has successfully conciliated as a percentage of all Title VIII complaints it closed. As shown in exhibit 1.5, in fiscal year 1977, only 9 percent of the 2,982 complaints closed by HUD were successfully conciliated—the lowest percentage since 1973 when also only 9 percent of 2,376 complaints closed were successfully conciliated.

Indeed, HUD was able to conciliate successfully only 53 percent of all Title VIII complaints it attempted to conciliate in fiscal year 1977, little more than half of all complaints in which HUD found Title VIII violations; this represented 256 successful conciliations in 484 attempts.[247] HUD has referred only about 10 percent of the cases it was

[242] Hubschman letter.

[243] This problem is discussed further in this chapter under the section entitled "Civil Rights Responsibilities."

[244] When conciliation fails and HUD is of the opinion that the matter constitutes a pattern or practice issue or one of general public policy, the case is referred to the Department of Justice for possible civil action. In fiscal year 1977, HUD referred at least 17 cases to the Department of Justice. An individual who wishes to pursue a complaint of discrimination under Title VIII must file a civil suit in court if (1) HUD's conciliation process is not successful and (2) there is no indication of a pattern or practice of Title VIII violations.

[245] Hubschman letter.

[246] Frank Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, telephone interview, July 11, 1978. Department of Justice activities are discussed in a separate chapter of this report.

[247] HUD response. For the 9-month period ending June 30, 1978, the Department successfully conciliated 250 complaints, and 59 housing units were obtained for complainants who requested a unit as part of their individual relief. Hubschman letter.

unable to conciliate to the Department of Justice for further action.[248] HUD has observed that, at least in part, this is because "HUD referrals to the Department of Justice are restricted by statute to cases presenting a pattern and practice of discrimination."[249]

The inadequacy of the conciliation process is further demonstrated by the relief obtained by the complainants when conciliation is deemed by HUD to be "successful." HUD reports that where successful conciliations have occurred, the complainant secured the contested housing only 22 percent of the time.[250]

Other relief which HUD considered to constitute successful conciliation included securing housing for members of the complainants' class, securing housing for the complainant on a "next vacancy" basis, revising advertising requirements, institution of reporting procedures, and establishing affirmative action provisions.[251] In some cases, damages have been awarded.[252]

C. Referrals to State and Local Governments

To the extent that State or local governments operate fair housing programs which are "substantially equivalent" to HUD's, HUD is required by Title VIII to refer complaints to those jurisdictions for a period of at least 30 days to permit the jurisdictions the opportunity to resolve them before any HUD action is taken.[253]

In addition to the State and local agency complaint processing that can assist HUD with its workload, another value of HUD referrals to State or local agencies is that some States have the power to obtain a temporary restraining order to prevent a respondent from renting or selling housing or to issue cease and desist orders.[254] Such States thus may have greater potential for effecting fair housing than does HUD.

HUD's central office is responsible for reviewing and evaluating State and local laws to determine if they have an agency which qualifies for substantial equivalency status.[255] If a State or local agency qualifies, HUD will refer only those complaints that appear to assert a violation of the State or local fair housing law.[256]

HUD regulations state that recognition of "substantial equivalency" will be conditioned upon the Department's evaluation of the text of the jurisdiction's housing law and its regulations pursuant to that statute.[257] HUD is also to look at the organization of the agency responsible for administering and enforcing fair housing, the amount of funds and personnel made available to such agency for fair housing purposes, and the agency's ability to administer satisfactorily its law in accordance with the Department's established performance standards.[258]

"Substantial equivalency" status is to be based upon the following criteria:

1. State or local law must provide for an administrative enforcement body to receive and process complaints;
2. The administrative enforcement body must have authority to investigate allegations of complainants and have the power to conciliate complaint matters;
3. State or local law may not place any excessive burdens on the complainant which might discourage the filing of complaints;
4. The State or local law must be sufficiently comprehensive in its prohibitions so as to be an effective instrument in carrying out the purposes and intent of Title VIII;

[248] Detailed information on HUD referrals is available for fiscal years 1973 and 1974. During those years, HUD referred 50 cases and DOJ filed suit in approximately 10 of those cases. DOJ did not file suit in the remaining cases for a variety of reasons. For example, litigation was unnecessary in about 7 of the cases because private action was instituted or because a change had occurred in the case which did not require action. In about 13 cases, DOJ found insufficient evidence to file suit. Frank E. Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, letter to Cynthia N. Graae, Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, Feb. 22, 1978.

[249] Hobechman letter.

[250] Title VIII response. This may be, in part, attributable to delays in complaint processing. By the time HUD is able to conciliate a complaint, not only may the housing in question be occupied, but also the complainant may have secured permanent housing.

[251] Kenneth Holbert, Director of Fair Housing and Contract Compliance, HUD, telephone interview, Dec. 6, 1977.

[252] HUD reports that in fiscal year 1976, with 584 successful conciliations, the total monetary compensation it secured was $192,865. HUD response.

[253] 42 U.S.C. § 3610(c) (1970).

[254] The Massachusetts Commission Against Discrimination, New York Division of Human Rights, and California Fair Employment Practices Commission, for example, have both these authorities.

[255] 24 C.F.R. § 115 (1977), Recognition of Substantially Equivalent Laws Under Authority of the Department of Housing and Urban Development Act of 1965. Section 115.8(a) states:

> The initial and continued recognition by the Secretary that a State or local fair housing law provides rights and remedies substantially equivalent to those provided in the Act will be dependent upon, where applicable, an assessment of the State or local agency's administration of its fair housing law to insure that the law is in fact providing substantially equivalent rights and remedies.

[256] 24 C.F.R. § 115.2(a) (1977).

[257] *Id.*

[258] A State or local law may be determined substantially equivalent if it meets all of the criteria set forth for substantial equivalency but does not contain adequate prohibitions with respect to one or more of the prohibited acts based on discrimination because of sex. 24 C.F.R. § 115.3 (1977).

5. The State or local law must not contain exemptions that are substantially less than the coverage of Title VIII.[259]

Title VIII states that the Secretary of HUD "may reimburse" State and local agencies "for services rendered to assist him in carrying out" the requirements of that title.[260] The Department has provided State and local agencies with technical assistance through Title VIII training seminars, but does not provide financial assistance to State and local agencies[261] to expedite a national enforcement effort.

Prior to October 1977, HUD's determination of substantial equivalency status had been only on an interim basis. In 1977 HUD withdrew its interim determinations and, as a result of a review of all State agencies, formally conferred substantial equivalency status.[262]

There are 22 States and the District of Columbia which HUD recognizes as having fair housing statutes "substantially equivalent" to Title VIII.[263] HUD expects to announce substantial equivalency status for local jurisdictions in late 1978.[264]

In fiscal year 1977, only seven complaints were referred to State agencies. In that year, complaint referrals were curtailed pending the outcome of the HUD review which led to the formal determinations of substantial equivalency status in October 1977.[265]

Statistics are available on complaint referrals from earlier years as well. For example, in fiscal year 1976, a total of 694 Title VIII complaints were referred to State and local agencies.[266] Sixty-one percent (418) of these complaints were closed by the State or local agency.[267] Most of the closures were not successful conciliations. Indeed, since fiscal year 1973, State and local agencies have been able to conciliate successfully no more than 14 percent of all complaints referred by HUD.[268]

According to HUD regulations, HUD must routinely withdraw complaints from State and local agencies if the agencies have failed to commence an investigation within 30 days of receiving those complaints.[269] Moreover, despite the fact that State agencies have been more successful than HUD in achieving successful conciliations, on balance, prior to 1977, the process of referring complaints more frequently to State agencies only added to the lengthy time it took the Department to make final determinations on complaints.[270] In fiscal year 1976, 51 percent of all complaints referred by HUD were recalled from local agencies; in fiscal year 1975, 52 percent were recalled.[271]

It is possible that HUD's recent review of substantial equivalency status, resulting in referral to only a few State agencies, may reduce the recall rate. As of early 1978, however, it was too early to determine how well the system was operating. HUD did note, however, that in the first 10 months of fiscal year 1978, it had referred 174 complaints to State agencies.[272]

D. Compliance Reviews

Effective and affirmative enforcement of Title VIII dictates that HUD provide for other activities to supplement complaint handling. The Department acknowledges that, heretofore, only "limited resources" have been utilized for compliance reviews under Title VIII.[273] In some cases, it is apparent that the regional offices have chosen not to make compliance reviews a priority. As a consequence, compliance reviews are not regularly conducted in all HUD regional offices. For example, during fiscal year 1976, no reviews of conciliation agreements were conducted by the Chicago Regional Office;[274] the Atlanta Regional Office failed to conduct any onsite compliance reviews of executed conciliation agreements.[275] In the same year, in the Seattle region, HUD reports that no compliance reviews were conducted within the jurisdiction of one HUD

[259] 24 C.F.R. § 115.3 (1977).
[260] 42 U.S.C. § 3616 (1970).
[261] Holbert interview, Dec. 6, 1977.
[262] Laura Spencer, Director, Fair Housing Enforcement, HUD, telephone interview, Dec. 6, 1977.
[263] 42 Fed. Reg. 63424 (Dec. 16, 1977).
[264] Laura Spencer, Director, Fair Housing Enforcement, HUD, telephone interview, Apr. 7, 1978. In late 1977 HUD estimated that 31 States, the District of Columbia, and 450 local jurisdictions had fair housing laws. HUD response.
[265] Title VIII response.
[266] Ibid.
[267] In fiscal year 1973, 59 percent of all complaints referred to local agencies were closed; 57 percent were closed in fiscal year 1974 and 37 percent in fiscal year 1975. Title VIII response.
[268] In fiscal year 1973, 18 percent of all complaints closed by State or local agencies were successfully conciliated; in fiscal year 1975, the figure was 19 percent. HUD could not provide data for fiscal year 1974. Title VIII response.
[269] 24 C.F.R. § 105.20 (1977).
[270] Indeed, GAO found that HUD's efforts to take timely action in processing complaints have been somewhat hindered because the Department must refer complaints to substantially equivalent agencies. GAO study, p. 24.
[271] Title VIII response.
[272] Hubschman letter.
[273] *HUD Justification for 1978 Estimates* (March 1977).
[274] *HUD On-Site Operational Performance Evaluation* (Chicago).
[275] *HUD On-Site Operational Performance Evaluation* (Atlanta). The Atlanta office, in fiscal year 1976, also failed to conduct any onsite reviews of affirmative fair housing marketing plans.

area office simply because the area office had made no requests for the regional office to conduct any reviews.[276]

In fiscal year 1977, HUD regional offices conducted a total of 91 compliance reviews. Of the 91 conducted, HUD reviewed 28 conciliation agreements and 63 affirmative marketing plans[277] The total number of reviews conducted in fiscal year 1977 represented a sharp reduction since fiscal year 1976, when HUD regional offices conducted 326 compliance reviews.[278] Twenty compliance reviews were conducted in fiscal year 1973, 104 in fiscal year 1974, and 188 in fiscal year 1975.[279]

E. Communitywide Pattern and Practice Reviews

This Commission has long recommended that HUD undertake communitywide investigations to identify patterns of housing discrimination. In 1974 the Commission recommended that in 1975 HUD conduct at least 50 comprehensive, communitywide, Title VIII compliance reviews of all major institutions which affect the production, sale, and rental of housing, including State and local governments, housing authorities, builders and developers, real estate brokers, managers, and lenders. The Commission also recommended that subsequently HUD should set yearly goals for the number of such reviews to be conducted by each HUD regional office.[280]

Although HUD acknowledged as early as July 1972 the necessity for Title VIII communitywide investigations to identify patterns of housing discrimination,[281] the Department 6 years later had failed to implement a policy of conducting such investigations.[282] HUD's Office of Fair Housing and Equal Opportunity has failed to conduct communitywide pattern and practice reviews except of affirmative fair housing marketing plans or conciliation agreements.[283] HUD has funded research on housing discrimination. For example, with HUD funding, the American Bar Association Advisory Committee on Housing and Urban Growth conducted a study entitled *Housing For All Under Law,* and the National Committee Against Discrimination in Housing conducted a housing market practices survey.[284] It has also conducted "administrative meetings" to study or publicize housing discrimination.[285] However, HUD has not conducted reviews that involve collective examination within a community of such matters as coverage of State and local fair housing laws, the type and quality of activity conducted by fair housing agencies, zoning ordinances, marketing activities of selected brokers and builders, mortgage financing practices of a sample of lenders, and data indicating the racial and ethnic composition of neighborhoods throughout the area.[286]

HUD maintains that Title VIII does not provide a legislative mandate to conduct communitywide pattern and practice reviews apart from investigation pursuant to a complaint.[287] However, Section 808(e) of the Civil Rights Act of 1968 mandates that the Secretary of Housing and Urban Development "shall. . .make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural throughout the United States."[288] Civil rights organizations, such as the Leadership Conference on Civil Rights, have maintained that Section 808(e) gives HUD both the right and responsibility to conduct communitywide pattern and practice compliance reviews.[289]

Even if one agrees with HUD's position with regard to Title VIII, there are a number of other authorities which HUD could use collectively to conduct such reviews. For example, compliance reviews of the operations of individual respondents are appropriate when complaints have been filed with HUD. Thus, in the course of a communitywide pattern and practice review, HUD could clearly investigate practices of all members of the local real estate industry against whom complaints have been

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[276] *HUD On-Site Operational Performance Evaluation* (Seattle).
[277] Title VIII response. Reviews of affirmative marketing plans are discussed above.
[278] Title VIII response. Prior to fiscal year 1977, HUD records of compliance reviews of executed conciliation agreements and affirmative fair housing marketing plans were consolidated. Thus, HUD records did not indicate how many of the 1976 reviews were the result of affirmative marketing plans or conciliation agreements. Title VIII response.
[279] Title VIII response.
[280] *To Provide. . .For Fair Housing,* pp. 346–48.
[281] HUD's 1972 position is discussed in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—A Reassessment* (1973), p. 34.
[282] Title VIII response.
[283] Ibid.
[284] Hubachman letter.
[285] As discussed below, the meetings are informal and do not result in negotiations for Title VIII compliance.
[286] Spencer interview, Dec. 6, 1977.
[287] Holbert interview, Dec. 6, 1977.
[288] 42 U.S.C. § 3608 (d)(1) (1970). HUD's failure to issue substantive Title VIII regulations may have fostered uncertainty about the meaning of Section 808(e); the absence of regulations has fostered uncertainty as to whether HUD can conduct investigations, absent a complaint, of entities not receiving HUD assistance.
[289] Glenda Sloane, Chairperson, Housing Task Force, Leadership Conference on Civil Rights, telephone interview, Mar. 9, 1978.

filed. In conjunction with its review, HUD could engage in an advertising campaign to invite all persons with fair housing complaints against some segment of the real estate industry in the community to bring those complaints to HUD. The promise of prompt complaint investigations in connection with the impending review might stimulate the filing of more than the usual number of complaints, and this could allow HUD to widen the scope of its review.

Additionally, within a community, HUD has authority to include in a communitywide pattern and practice review investigation of those members of the real estate industry who participate in HUD programs.[290] For example, within a community HUD could conduct a single review which encompassed builders and developers who have received HUD subdivision approval,[291] brokers who have signed the joint HUD–VA broker certification and are eligible to manage or sell HUD-acquired property, and lenders who make HUD-insured mortgages. Moreover, where HUD believes that it lacks any authority through its own programs for investigating members of the real estate industry, it could seek the assistance of other Federal agencies, such as the Federal financial regulatory agencies which regulate lending institutions and VA and FHA, which also provide assistance to builders, developers, and brokers. HUD could request that these agencies either delegate authority to HUD for conducting investigations or conduct investigations themselves and share the results with HUD.[292]

Finally, to broaden the scope of the authority HUD believes it possesses, the Department could conduct compliance reviews of builders, developers, and brokers who participate in its FHA programs as well as any of the approximately 1,343 entitlement communities which are the recipients of community development block grant funds. Pursuant to requirements under Section 104(a)(5) of the act,[293] a locality must sign a certificate of assurance that it will comply with Title VIII. HUD has the authority to monitor compliance with this assurance by conducting compliance reviews of the locality's own operations.[294] Moreover, pursuant to the Title VIII certificate of assurance, recipient jurisdictions agree "to take action to affirmatively further fair housing. . .in the sale or rental of housing, the financing of housing and the provision of brokerage services within the recipient's jurisdiction."[295] Activities pursued to further fair housing affirmatively need not be limited to those funded under the community development block grant program.[296] HUD could make clear to recipient jurisdictions that one of the affirmative steps expected of them is to secure for HUD the cooperation of the local real estate industry in HUD's communitywide compliance review.[297]

F. Administrative Meetings

In November 1972 HUD issued regulations regarding "Fair Housing Administrative Meetings."[298] The purpose of these public meetings is to identify and publicize discriminatory housing practices and to "promote and assure" equal housing opportunity.[299]

These meetings are an important element in HUD's execution of its fair housing responsibilities. Although administrative meetings are informal and do not directly result in negotiations leading to compliance with Title VIII, they can provide impetus for formal HUD investigations and provide public exposure to discriminatory housing conditions.

However, in 1976 and 1977, HUD held only one such meeting.[300] On July 14, 1976, the Office of Fair Housing and Equal Opportunity sponsored an administrative meeting on redlining and disinvestment.[301] The major purpose of the meeting was to

[290] 42 U.S.C. § 3608 (1970).

[291] HUD notes that the Chicago Regional Office conducted an areawide review of all affirmative fair housing marketing plans in operation in Chicago. Hubachman letter.

[292] See other chapters in this report for a discussion of these agencies' authority to conduct compliance reviews and complaint investigations.

[293] 42 U.S.C. § 5304 (Supp. V 1975).

[294] 42 U.S.C. § 3608(d) (1970).

[295] U.S., Department of Housing and Urban Development, *Guidelines for Applicants on Equal Opportunity Obligations for Community Development Block Grants* (1977).

[296] Ibid.

[297] Local governments often have some leverage over the private housing industry by virtue of their licensing, permit, or other regulatory authority.

[298] 24 C.F.R. § 106.1 (1977). The regulations were issued under the authority of Sections 808(e) and 809 of Title VIII of the Civil Rights Act of 1968.

[299] 24 C.F.R. § 106.1 (1977).

[300] Earlier administrative meetings were also conducted on discrimination in off-base housing for military personnel, discrimination in financing, and discrimination against Hispanics. The meetings on discrimination against Hispanics were held in three separate locations. Hubachman letter.

[301] In HUD's summary of the meeting, HUD stated:

> Redlining was defined by many of the individuals testifying. Almost all these definitions reflected the opinion that redlining was a policy on the part of lenders not to grant mortgage or home improvement loans in certain geographic areas, regardless of the physical condition of the home or the credit worthiness of the potential buyer.
>
> Moreover, witnesses who also defined disinvestment in mortgage lending seemed to make almost no distinction between the terms redlining and disinvestment, except that the term disinvestment was

obtain information on the types of discrimination in mortgage lending and remedies HUD and other agencies regulating mortgage lenders could effect under their present authorities to eradicate these practices.[302]

Participants[303] in the meeting concluded that the response of the Federal Government to the redlining issue has been unimpressive and that HUD had failed to respond to the issue of discrimination in mortgage lending.[304] To assault the problem of redlining, participants recommended the following:

- HUD should issue regulations or guidelines which would inform lenders as to what practices constitute redlining: An example of such regulations would be a prohibition against consideration of the racial composition of a neighborhood in appraisals and underwriting.
- HUD appraisal and underwriting standards should contain affirmative statements and policies. Language in the HUD/FHA Handbook[305] which has the effect of perpetuating discrimination should be removed.
- HUD should utilize data available through the Home Mortgage Disclosure Act of 1975[306] to monitor the practices of HUD-approved lenders. Although the use of such data for purposes of monitoring is not a requirement under the act, HUD initiative in this respect is necessary to assure equal opportunity in lending practices.[307]

Another important subject which HUD could address through the forum of the administrative meeting is religious discrimination in housing. In fiscal year 1978 HUD received 46 complaints of religious discrimination. Undoubtedly, the problem of religious discrimination is greater than the number of complaints would indicate. As discussed in chapter 2 of this report, the Department of Justice has been active in litigating housing discrimination cases based on religion. Use of administrative meetings to discuss and deal with religious discrimination in housing appears especially appropriate inasmuch as the comprehensive study HUD released this year on the extent of housing discrimination in this country did not examine this type of discrimination.

G. Other Title VIII Efforts

In April 1978 the Secretary of Housing and Urban Development announced two additional HUD efforts for eliminating housing discrimination:

> First, we will award a $28,000 contract to the National Committee Against Discrimination in Housing to prepare guidebooks and materials on fair housing to be used by local agencies and organizations. . . .this further work will strengthen local fair housing groups. . . .
>
> Second, I am announcing today that HUD will fund a $500,000 demonstration project to test the feasibility of contracting with local private human rights and fair housing agencies for the performance of specified fair housing and equal opportunity functions. We will contract with a national organization to conduct a test to determine the extent to which HUD can extend its enforcement of Title VIII and reduce discrimination by contracting with local agencies. . . .
>
> Through this demonstration, we hope to learn which efforts by local agencies are most effective in combating and enforcing discrimination and how to carry out an expanded Title VIII program with minimal cost to the Government. Our demonstration will seek to build a fair housing partnership with local groups and cities in metropolitan areas they serve.[308]

In August 1978, HUD added:

> The Department is implementing the two measures announced by the Secretary. The $28,000 contract to NCDH has already been executed as an amendment to its existing contract for the major study of discrimination in housing. The other program announced is being developed through the cooperation of the

often used to describe the withdrawal of resources other than mortgage or home improvement loans. HUD, *Administrative Meeting on Redlining and Disinvestment as a Discriminatory Practice in Residential Mortgage Loans* (July 1976) (hereafter cited as *Redlining and Disinvestment*).

[302] Ibid.

[303] Participants included (but were not limited to) the National Urban League, the Housing Association of Delaware Valley, the Metropolitan Washington Planning and Housing Association, the National Committee Against Discrimination in Housing, the Center for National Policy Review, and the U.S. Commission on Civil Rights. *Redlining and Disinvestment.*

[304] *Redlining and Disinvestment.*

[305] HUD Handbook instructions to FHA appraisers indicate that the income level of the neighborhood is to be considered when estimating the value of the property. HUD Handbook 4150.1, *Valuation Analysis for Home Mortgage Insurance*, 91-36(d). The Handbook also suggests to the appraiser that, "to obtain its maximum value, the property must conform to its existing surroundings in size, age, condition and style and should attract an occupant of similar economic status." *Id.* 1–13(d).

[306] Home Mortgage Disclosure Act of 1975, § 301, 12 U.S.C. § 2801 (1975). Data required under this legislation are discussed in the chapter in this report on the Federal financial regulatory agencies.

[307] *Redlining and Disinvestment.*

[308] Remarks by Patricia Harris, Secretary of Housing and Urban Development, before the National Committee Against Discrimination in Housing, Apr. 17, 1978.

EXHIBIT 1.6

Title VI Complaint Processing by Fiscal Year

	Fiscal Year			
	1974	1975	1976*	1977
Number of complaints filed	235	265	142	87
Number of findings of noncompliance	48	42	16	6
Ratio of findings of noncompliance to complaints filed	1/5	1/6	1/9	1/4

*Includes the transition quarter.

Source: Computed from data in exhibit 1.4.

Assistant Secretaries for PD&R and FH&EO. A Request for Proposals has been issued; proposals are to be submitted by August 28, 1978.[309]

V. Enforcement of Title VI and Section 109

In fiscal year 1977, HUD estimated that 24 percent of equal opportunity staff time was applied to Title VI[310] and Section 109[311] enforcement activity.[312] This time was divided between complaint investigations and compliance reviews of the operations of HUD program recipients.

A. Complaint Processing

In fiscal year 1977, HUD received "approximately" 87 Title VI complaints.[313] As shown in exhibit 1.6, this was a substantial decrease from fiscal year 1976, when 142 complaints were filed.[314] It was an even greater decrease from fiscal year 1975, when 265 complaints were filed.[315] Despite this decrease in HUD's Title VI complaint workload, as of December 1977, HUD maintained a backlog of 24 complaints. Sixteen of the complaints in backlog status were awaiting investigation, while the other 8 were only partially investigated.[316]

The number and percentage of Title VI violations HUD has found has decreased in recent years. As shown in Exhibit 1.5, in fiscal year 1977, HUD found violations in only 6 instances—about 1 violation for every 14 complaints filed. In contrast, in fiscal year 1974, 48 complaints led to findings of Title VI violations—about 1 violation for every 5 complaints filed.[317]

The Department of Justice has reported that HUD's delays in complaint processing "may explain, in part, why there has been a decrease in the number of Title VI complaints filed with HUD. . . ."[318] The General Accounting Office, too, reported that HUD Title VI complaint investigations are not thorough or completed in a timely manner.[319] The General Accounting Office reviewed 49 complaints received by HUD over a 3-year period, in three HUD regions,[320] and found that HUD took an average of 228 days to determine if a recipient had violated Title VI, including an average of 83 days before investigations were initiated. Moreover, even when no investigation took place, HUD Title VI com-

[309] Hubschman letter.
[310] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d-2000d-6 (1970)).
[311] The Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 649 (codified at 42 U.S.C. § 5309 (Supp. V 1975)).
[312] This compares with 20 percent of staff time in fiscal year 1973.
[313] Title VI response.
[314] Ibid.
[315] The National Committee Against Discrimination in Housing suggests that the declining number of complaints filed is "usually evidence of a loss of faith of potential complainants in [the] possibility of justice through timely remedies." Ernest Erber, Director, Research and Program Planning, NCDH, telephone interview, June 23, 1978.
[316] Title VI response.
[317] Ibid.
[318] U.S., Department of Justice, Civil Rights Division, Federal Programs Section, *Interagency Survey Report Evaluation of Title VI Enforcement at the U.S. Department of Housing and Urban Development* (September 1977) (hereafter cited as *DOJ Interagency Survey Report*).
[319] GAO study.
[320] The GAO study took place between January 1973 and April 1976 in the Chicago, Atlanta, and San Francisco regions.

plaint processing has been protracted; 16 complaints took an average of 202 days to resolve even though HUD never investigated them.

HUD's own estimate of the average time for processing Title VI complaints is similar. In December 1977 HUD stated that it takes an average of 200 days from the receipt of a Title VI complaint to its resolution.[321]

These delays in complaint handling appear permissible under HUD's regulations, which do not contain adequate guarantees of more rapid complaint handling. While HUD regulations call for "prompt" investigations of complaints,[322] they do not specify what is considered prompt.

Title VI investigations are to include a review of recipient policies and practices to determine whether the recipients are complying with Title VI. Because HUD funds are involved, the Department may investigate a complaint even though the complainant may no longer wish to pursue the matter. Indeed, HUD regulations require a complaint investigation whenever there are indications that program recipients are not complying.[323] Nonetheless, GAO discovered that HUD often failed to investigate complaints simply because the complainant withdrew the charges.[324]

B. Compliance Reviews

Compliance reviews can be an effective and systematic way of assuring nondiscriminatory operation of programs because they include all aspects of the operation of a HUD-funded agency program. Complaint investigations, on the other hand, often address only that aspect of the program covered in the complaint. In its fiscal year 1978 budget, HUD indicated that its goal is to make compliance reviews the core of the Title VI program.[325]

As of late 1977, in any fiscal year, Title VI compliance reviews had never reached as many as 2 percent of HUD's approximately 14,000 recipients; i.e., communities, agencies, or other organizational entities which receive HUD funds. The Department set a goal of 4 percent coverage (about 600 reviews) for fiscal year 1977, with a focus on block grant recipients. In that year, HUD had completed 219 compliance reviews—more than double the 108 conducted in fiscal year 1976.[326] However, these 219 reviews represented only 1.6 percent of HUD's total recipients.

HUD compliance reviews under Title VI have focused principally on local housing authorities. In fiscal year 1977, 56 percent of all compliance reviews conducted were of local housing authorities representing only 3 percent of all housing authorities receiving HUD assistance.[327] In that same year, 21 percent of all compliance reviews conducted focused on private sponsors/owners of subsidized housing, representing less than 1 percent of such sponsors/owners.[328] The bulk of the remaining reviews focused on block grant recipients.[329]

C. Corrective Action

In fiscal year 1977, HUD uncovered 51 cases of noncompliance through its compliance reviews (see exhibit 1.7). This represented a finding of noncompliance in 21 percent of all reviews conducted by HUD in that year.

When voluntary compliance efforts have not succeeded within 60 days after notice of apparent noncompliance, the assistant regional administrator must refer the matter to the Washington office for initiation of an administrative hearing.[330] Nonetheless, HUD has not required prompt correction of the noncompliance uncovered in its reviews. In 70 cases in 1977, HUD had been unable to achieve voluntary compliance before the 60-day limitation and continued to carry out protracted negotiations beyond that time.[331]

Although HUD deferred payments to recipients in five cases during fiscal year 1977 (all of which were local housing authorities), the Department has only once terminated funding for a recipient.[332] Until

[321] Title VI response.
[322] 24 C.F.R. § 1.7(c) (1977).
[323] Ibid.
[324] GAO study.
[325] *HUD Justification for 1978 Estimates.*
[326] Title VI response.
[327] Ibid.
[328] Ibid.
[329] Ibid. HUD commented, "It should be noted that reviews of block grant recipients are generally much more time consuming than reviews of housing authorities." Hubschman letter.
[330] HUD, Handbook 8040.11, *Compliance and Enforcement Procedures for Title VI of the Civil Rights Act of 1964* (June 1976). An administrative hearing is a formal process to determine whether a recipient is in compliance. If noncompliance is found, then Federal funding is terminated.
[331] Title VI questionnaire. These cases of noncompliance are not limited to those discovered in fiscal year 1977, as the protracted period of negotiation overlaps fiscal years in some cases.
[332] Moreover, HUD notes that, "this termination was reversed by the Federal courts, which held that HUD's determination was not supported by the evidence." Hubschman letter. However, in 1974, HUD did declare the city of Cheyenne, Wyoming, ineligible to receive "Model Cities" funds under the Demonstration Cities and Metropolitan Development Act of 1966 after the Department had found that city was discriminating against minorities in the administration of the program. Pearl telephone interview.

EXHIBIT 1.7

Title VI Compliance Reviews Resulting in Findings of Noncompliance

	1974	1975	1976*	1977
Total number of compliance reviews	94	196	211	238
Number of reviews resulting in findings of noncompliance	29	42	45	51
Percent of reviews resulting in findings of noncompliance	31	21	21	21

*Includes the transition quarter.

Sources: Laura Spencer, Director, Fair Housing Enforcement, HUD, memorandum to Michael Hatfield, U.S. Commission on Civil Rights, Dec. 14, 1977, and Henry A. Hubschman, Executive Assistant to the Secretary, letter to Louis Nuñez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 17, 1978.

HUD is willing to terminate funds for violations of Title VI, it is likely that in many of its programs recipients will remain out of compliance while the Department engages in protracted negotiations.

HUD records indicate that between October 1975 and June 1977, at least 16 instances of noncompliance by public housing authorities were uncovered. As of November 1977, none had been corrected. All but two of these public housing authorities remained out of compliance for a year or more. Moreover, as of August 16, 1978, only eight of these cases were resolved, including three that were dismissed for insufficient evidence and five that were settled with submission of acceptable affirmative action plans. Of the eight unresolved cases, four were being prepared for administrative hearings, two were in active negotiation, and two were still under review.[885]

Similarly, the Department of Justice reported that, in a survey conducted by the HUD Atlanta Regional Office in 1974, 57 local housing authorities had failed to adopt tenant selection and assignment plans.[886] By the end of 1975, more than 1 year, 14 of the local housing authorities still had not adopted tenant selection and assignment plans.[887]

Even where HUD does succeed in obtaining a voluntary compliance agreement, it often does not follow up to ensure that the agreements are executed. In fiscal year 1977, HUD monitored only 17 agreements, representing only 11 percent of the 146 agreements negotiated since fiscal year 1974.[888]

The inadequacy of HUD's compliance reviews and enforcement program is emphasized by the findings in the General Accounting Office study. GAO examined data on the racial composition of 112 HUD-funded public housing projects administered by six public housing authorities. It found that in 64 (58 percent) of the projects, 85 percent or more of the tenants were of one race.[889] In fact, 40 of the 64 projects had no more than two tenants who were not of the majority race in the project.[890] HUD observed:

> The fact that project sites are racially identifiable is not, in and of itself, sufficient to support a finding of a violation of Title VI. Further, the Department does not rely solely upon a numerical occupancy figure or the racial identifiability of projects for determining whether the tenant selection and assignment plan of a public housing authority is consistent with the objectives of Title VI of the Civil Rights Act of 1964, as provided in 24 CFR 1.4(b)(2)(ii). Any discussion of departmental policy involving the use of minimum percentages of minority occupants is inappropriate and any conclusion as to the compliance of Housing Authorities with

[885] Hubschman letter.
[886] *DOJ Interagency Survey Report.* HUD requires local housing authorities to adopt tenant selection and assignment plans for offering units to eligible applicants according to the time their applications are received, considering the type and size of unit needed and factors affecting preference and priority for housing. Preference is to be given to special groups of applicants or those with housing needs that HUD wants to emphasize in providing benefits.
[887] Ibid.
[888] Title VI response.
[889] GAO study.
[890] Ibid., p. 12.

Title VI drawn from the application of the policy is inaccurate.[339]

While this Commission concurs with HUD that statistics indicating that project sites are racially identifiable do not necessarily imply violation of civil rights laws, it believes that where there are racially identifiable patterns in HUD-funded projects, HUD should require its recipients to demonstrate that these patterns are not the result of discrimination.

In the case of the six housing authorities reviewed by GAO, there was additional evidence that the authorities were not following procedures which would result in equal opportunity. GAO reviewed applicants' files at the six housing authorities to determine if people: (1) were offered housing in the order they applied, and (2) were offered housing according to the date they applied or became eligible. The review "showed that housing authorities were not following their tenant selection plans" and all six authorities examined "were offering units to applicants out of turn, even among applicants who had the same preference and need for housing."[340]

VI. Community Development Block Grant Program

A. HUD's Affirmative Mandate

The 1974 Housing and Community Development Act requires that communities work toward "the reduction of the isolation of income groups within communities and geographical areas. . .through the spatial deconcentration of housing opportunities for persons of lower income. . . ."[341] HUD guidelines require block grant recipients to further fair housing affirmatively by taking actions to prevent discrimination on the grounds of race, color, sex, or national origin in the sale or rental of housing, the financing of housing, and the provision of brokerage services within the recipient's jurisdiction.[342] Additionally, pursuant to Title VIII (Section 808(d)),[343] HUD requires communities receiving funds to "administer all programs and activities relating to housing and community development (not merely those programs funded under the block grant program) in a manner to affirmatively further fair housing in the sale or rental of housing, the financing of housing, and the provision of brokerage services within the applicant's jurisdiction."[344]

Applications for community development block grants include assurances which pledge compliance with Title VIII of the Civil Rights Act of 1968, Title VI of the Civil Rights Act of 1964, and Executive Order 11,063.[345] Through the assurance, the locality commits itself to a housing assistance plan and a community development program which will "promote maximum choice within the community's total housing supply, lessen racial and ethnic concentrations, and facilitate desegregation and racially inclusive patterns of occupancy. . . ."[346] HUD guidelines further require grant recipients to take into consideration any special housing needs found to exist among minorities and women within the total group of lower income persons in the community.[347] Among the needs of minorities that may be found to be more severe than the needs of the lower income population in general, suggests HUD, are:

(a) Effects of past discrimination in housing which may have resulted in minority overconcentration, overcrowding, a greater likelihood for minorities to be living in substandard housing, and increasing inaccessibility to new employment centers.

(b) Effects of past discrimination in which minority neighborhoods are lacking in municipal facilities and/or services commonly available in nonminority areas, including among others: health care, educational facilities and recreational facilities.[348]

With respect to women, needs which are more urgent than the needs of the lower income population in general will be found predominantly among female heads of households (who are disproportionately minority). Such needs include:

(a) Discrimination in housing, both rental and sales.

[339] Hubschman letter.
[340] GAO study, pp. 4 and 5.
[341] 42 U.S.C. § 5301 (Supp. V 1975).
[342] HUD, *Guidelines for Applicants on Equal Opportunity Obligations for Community Development Block Grants* (1977) (hereafter cited as *Guidelines*).
[343] 42 U.S.C. § 3535 (Supp. V 1975).
[344] Hubschman letter. HUD commented: "In a new and innovative manner, HUD determined in 1974 that, due to the comprehensive character of CDBG/HAP Plan and Program requirements, it was appropriate to require the same of CDBG recipients as Title VIII requires of HUD." Ibid.
[345] 43 Fed. Reg. 8469, Mar. 1, 1978 (to be codified in 24 C.F.R. § 570.307).
[346] *Guidelines*.
[347] Ibid.
[348] Ibid.

(b) Significantly lower income-earning potential.[349]

HUD has also provided guidelines to communities indicating actions that may be affirmatively undertaken to further fair housing. Actions include:

(a) Developing and enforcing a fair housing law at least equivalent to the Federal fair housing law.

(b) Facilitating integrated housing in an area previously not integrated.

(c) Informing members of minority groups of housing opportunities in nontraditional neighborhoods and providing services to familiarize them with such neighborhoods.

(d) Providing escort services to brokers' offices in nontraditional neighborhoods.

(e) Funding fair housing groups, human relations bodies, and/or other groups interested in facilitating freedom of residence, and cooperating fully with these organizations.

(f) Developing site selection policies for housing and community development activities which promote equal opportunity in housing.

(g) Examining land use policies and practices (including zoning policies and building and housing codes) to determine if the application of these policies and practices has a discriminatory effect and, if so, taking steps to remove and prevent discriminatory effects.[350]

B. Fair Housing Implications

Beyond the barrier of overt discrimination in the sale, rental, and financing of housing, the policies and practices of many communities with regard to low- and moderate-income housing have been primary obstacles to fair housing for minorities and female-headed households. Many communities have excluded low-income housing altogether,[351] sometimes for the explicit purpose of keeping minorities outside their boundaries.[352] Even when the purpose of such a policy cannot be traced to the intent to exclude minorities, it nonetheless frequently has a discriminatory effect: both minority and female-headed households are disproportionately represented among those with low incomes,[353] and thus exclusion of low-income housing is a problem from which they suffer disproportionately. Further, even in those communities which do offer low- and moderate-income housing, such housing is often concentrated in one area. The effect can be that many minorities are segregated from the rest of the community[354] and may be also removed from the full benefit of the municipal and social services the community as a whole has to offer. Finally, because the availability of low- and moderate-income housing is inadequate and the quality of low- and moderate-income housing which does exist is often poor,[355] minority and female-headed households are frequently relegated to housing which is neither decent nor suitable.

Those specific goals of the community development block grant program directed toward the elimination of slums and blight, the deconcentration of the lower income population, conservation and expansion of the Nation's housing stock, and the expansion and improvement of community services, are all directed toward upgrading the housing conditions of principally those persons with low and moderate incomes.[356] Community development funds may be expended for the rehabilitation of single-family and multifamily housing by either public or private entities, including public housing modernization and rehabilitation financing for persons of low and moderate income.[357] Community development funds cannot be utilized, however, for the construction of new housing. The community development block grant program requires all communities receiving block grant funds to help

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[349] Ibid.

[350] Ibid.

[351] The Potomac Institute, *Equal Housing Opportunity: The Unfinished Federal Agenda* (December 1976) p. 52 (hereafter cited as *Equal Housing Opportunity*).

[352] Ibid.

[353] Census data for 1976 indicate that 39 percent of the Nation's black households have annual incomes of $10,000 or less as do 52 percent of all Hispanic households and 73 percent of all female-headed households. In contrast, 39 percent of all households have incomes of $10,000 or less. A family income of $10,000 is slightly lower than 80 percent of the Nation's median family income, which was $12,686 in 1976. U.S., Department of Commerce, Bureau of the Census, *Current Population Reports*, "Household Money Income in 1976 and Selected Social and Economic Characteristics of Households," Series P-20, No. 109 (January 1978), p. 33. Note: Under the Section 8 rent supplement program for assisted housing, HUD considers households whose incomes are 80 percent or less of the median income of their Standard Metropolitan Statistical Area to be low or moderate income. 42 U.S.C. § 1437f (Supp. V 1975).

[354] *Equal Housing Opportunity*, pp. 51–52.

[355] In 1975, 3 percent of all American households resided in "substandard" housing (defined as "lacking some or all plumbing"); the percentage of black households residing in such housing was 9 percent. U.S., Department of Commerce, Bureau of the Census, *General Housing Characteristics*, "Annual Housing Survey: 1975," Series H-150-75A (April 1977), pp. 32 and 44. Other minority groups, including Hispanics, Asian Americans, and Native Americans, as well as female-headed households are also more likely than nonminorities to live in dwellings with incomplete facilities. U.S., Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (August 1978).

[356] 42 U.S.C. § 5301(c) (Supp. V 1975).

[357] 43 Fed. Reg. 8443 (1978) (to be codified in 24 C.F.R. § 570.202).

meet the Nation's responsibility to provide housing for persons of low and moderate income.[358]

C. HUD Guidelines on CDBG Program

HUD regulations state that the activities funded under Title I[359] can be justified only if such activities give "maximum feasible priority" to benefiting low- and moderate-income families "or aid in the prevention or elimination of slums or blight."[360] With the approval of HUD, however, localities may also expend funds to address urgent needs.[361]

Until April 1977 HUD's requirements for justifying the use of funds for eligible activities had little practical meaning. In essence, the Department's criterion for determining whether activities gave "maximum feasible priority" to benefiting low- and moderate-income persons was whether the recipient certified to HUD that, in fact, it was complying with this provision. Compliance with the objectives of the 1974 Housing and Community Development Act and HUD regulations was, in effect, dependent upon the good faith of the community. Additionally, HUD itself was confused as to what constituted "maximum feasible priority." In interviews conducted with 20 HUD field office officials, the General Accounting Office found that there were seven different interpretations of "maximum feasible priority"—contributing to the wide range of activities which HUD accepted as being of benefit to low- and moderate-income persons.[362]

On April 15, 1977, the Office of Community Planning and Development[363] issued a memorandum clarifying "maximum feasible priority" to low- and moderate-income persons.[364] The memorandum stated that, in order to constitute maximum benefit to lower income persons, activities must be undertaken principally to benefit persons of that income group.[365] The memorandum, in part, stated the following:

> activities of general benefit, such as street and park improvements, must serve areas the majority of whose residents are lower income. Activities which provide direct benefits to individuals are those designed to meet identified needs of lower income persons who are required to be the principal beneficiaries. These could include a public service activity the majority of whose clients are lower income persons, or a rehabilitation loan program under which the majority of the residents whose housing is to be improved are lower income.[366]

An exception is permitted if a community's lower income population is small and dispersed and thus does not constitute the majority of any neighborhood or area. Even then, the activity may be approved only if it: (1) is located in or serves those areas having the largest proportion of lower income residents, (2) is clearly designated to meet identified needs of lower income persons, and (3) benefits lower income persons at least in proportion to their share of the population of the area.[367]

On March 1, 1978, HUD issued new community development block grant regulations to become effective in fiscal year 1979. Essentially, they adopted the principles of the April 15, 1977, memorandum. Section 570.302(d) of HUD regulations states:

> A project or activity will be considered to principally benefit low- and moderate-income persons if it is designed to meet identified needs of low- and moderate-income persons as described in the applicant's community development plan and it meets one of the following standards:
>
> (1) The project has income eligibility requirements that limit the benefits of the project to low- and moderate-income persons.
>
> (2) The project does not have income eligibility requirements but the majority of the beneficiaries are low- and moderate-income persons. . . .
>
> (3) Removal of architectural barriers pursuant to §570.201(k). . . .
>
> (4) A project which must be carried out prior to or is an integral part of a project which will principally benefit low- and moderate-income persons. An example is the extension of water

[358] 42 U.S.C. § 5304(a) (Supp. V 1975). This requirement which entails development of the Housing Assistance Plan is discussed below.
[359] 42 U.S.C. § 5301 (Supp. V 1975).
[360] 43 Fed. Reg. 8460 (1978) (to be codified in 24 C.F.R. § 570.302).
[361] *Id.*
[362] U.S., General Accounting Office, *Meeting Application and Review Requirements for Block Grants Under Title I* (June 1976).
[363] The Office of Community Planning and Development is the HUD program office which administers the community development block grant program.
[364] U.S., Department of Housing and Urban Development, Office of Community Planning and Development, memorandum to field staff, "Management of the Community Development Block Grant Program," Apr. 15, 1977 (hereafter referred to as Management of CDBG Program).
[365] Ibid.
[366] Ibid.
[367] Ibid.

and sewer lines to permit construction of low-rent housing. . . .

(5) A project which serves an area with less than a majority of low- and moderate-income persons; where: (i) The applicant has no areas within its jurisdiction where low- and moderate-income persons constitute a majority, or (ii) the applicant has so few such areas that it is inappropriate to limit the grant to projects in those areas. . . .[368]

HUD has determined in its new regulations that a block grant application is presumed principally to benefit low- and moderate-income persons "absent substantial evidence to the contrary" where at least 75 percent of a community's program funds are directed to benefit low- and moderate-income people as defined by Section 570.302(d).[369] "Substantial evidence" is not defined.

Also prior to April 1977, local communities took advantage of ambiguous language in HUD regulations which stated that program funds could be expended for activities directed at the "prevention or elimination of slums or blight."[370] Localities received funding for the acquisition of land for park development in high-income areas under the justification that such land was on the fringe of an already deteriorated area and that the proposed development would prevent the spread of blight.[371]

Similar ambiguity in HUD regulations existed concerning the option afforded communities to expend funds on activities justified as an urgent need.[372] Communities, for example, attempted to receive funding under urgent need justification for tennis courts and parkland in wealthy neighborhoods because regulations stated that any "situation requiring immediate action and attention" constituted urgent need.[373]

HUD's April 15 memorandum, however, further developed guidelines on what constitutes the pursuit of activities which aid in the "prevention or elimination of slums or blight" and what constitutes "urgent need." The guidelines state that activities which aid in the prevention or elimination of slums or blight are those activities designed to "alleviate or eliminate specific conditions of physical decay where they exist or where there are current objectively determinable signs of deterioration." Urgent need activities, states the memorandum, must be designed to alleviate a serious threat to health or welfare for which other sources of funding are not available.[374] Subsequently, the 1977 Amendments to the Housing and Community Development Act of 1974 adopted the new definition of urgent need. HUD observed that, "the net effect of the statutory change, based on earlier HUD guidelines, is to substantially reduce the number of activities based on urgent needs grounds."[375]

D. The Application Process

To receive community development block grants, a locality must submit required information to HUD on both an annual and triennial basis. Once every 3 years, a community submits a "Housing Assistance Plan" and a "Community Development and Housing Plan," which essentially outline an overall strategy to be pursued in addressing the housing and community development needs of the locality, including an affirmative strategy to facilitate equal opportunity.[376] On an annual basis, the locality submits an application for the receipt of funds under the block grant program. Incorporated within the annual application are the "Annual Housing Action Program" and "Annual Community Development Program." These documents represent the programs and activities to be implemented each year to facilitate the goals of the 3-year Housing Assistance Plan and the Community Development and Housing Plan, respectively.[377]

1. Housing Assistance Plan (HAP)

It is through the HAP that a locality details its plans to provide for low- and moderate-income housing as mandated by the 1974 act. Communities

[368] 43 Fed. Reg. 8461 (1978) (to be codified in 24 C.F.R. § 570.302(d)).
[369] 43 Fed. Reg. 8461 (1978) (to be codified in 24 C.F.R. § 570.302(b)(3)). These regulations do not become effective until applications are received for fiscal year 1979. In the interim, HUD has continued to administer the program according to clarifications adopted in the April 15, 1977, memorandum.
[370] 24 C.F.R. § 570.303(a) (1977).
[371] See Central and Western Development Corp. v. Hills, No. 76-67-D (S.D. Iowa, Oct. 22, 1976), and Montgomery Improvement Assn., Inc. v. U.S. Department of Housing and Urban Development, No. 77-45-N (M.D.Ala. filed Sept. 16, 1977).
[372] See Central and Western Development Corp. v. Hills.
[373] Management of CDBG Program. Even when funds are expended in low- and moderate-income areas, low-income families are often not the beneficiaries. A 1976 HUD report indicated that more than 80 percent of the funds spent in low- and moderate-income areas are, in fact, spent only in moderate-income census tracts. U.S., Department of Housing and Urban Development, *Community Development Block Grant Program: Second Annual Report* (1976), pp. 32-33.
[374] Ibid.
[375] Hubschman letter.
[376] 43 Fed. Reg. 8464, 8468 (1978) (to be codified in 24 C.F.R. §§ 570.304 and 570.306).
[377] *Id.*

must satisfy several HAP requirements to receive community development funds:

- The HAP is to indicate the general locations of proposed housing for lower income persons with the objective of furthering the revitalization of the community, promoting greater choice of housing opportunities, and avoiding undue concentrations of assisted persons in lower income areas. The HAP is also to provide a narrative statement which summarizes any special housing conditions in the community and special housing needs found to exist within the locality affecting minority and female-headed households.[378]
- The HAP is to specify a realistic goal for the number of dwelling units for lower income persons to be assisted, including the relative proportion of new, rehabilitated, and existing dwelling units.[379]
- The HAP is to survey accurately the condition of the housing stock in the community (taking into consideration elderly and handicapped, large families, and displacees) and assess the housing assistance needs of low- and moderate-income persons residing in or "expected to reside" in the community.[380]

HAP requirements dictate that all communities are expected to provide expanded housing opportunities for lower income persons and therefore must assess the housing assistance needs of lower income households which could "reasonably be expected to reside" in the community if there were a sufficient amount of lower income housing resources available to every locality.[381] HUD has interpreted the phrase "reasonably be expected to reside" as the number of additional lower income households in any given locality, if the locality's percentage of lower income households were to equal the proportion of lower income households in the Standard Metropolitan Statistical Area in which the community is located.[382]

In supplementing the expected-to-reside requirement, HUD makes clear that localities with very substantial housing needs have a responsibility to propose substantial housing goals.[383] Housing Assistance Plans with only "minimal housing goals," directs a HUD memorandum, should not be approved.[384]

A major criticism of the HAP requirements is that in attempting to determine what constitutes "minimal goals" for housing assistance, HUD regulations state that communities have an obligation to propose to meet "at least 15 percent" of their total low-income housing need over a 3-year period,[385] which is equivalent to only 5 percent of the total housing need each year during the 3-year period. The Housing Task Force of the Leadership Conference on Civil Rights has argued that such a standard is unnecessary,[386] since HUD regulations already state that "communities with very substantial housing assistance needs have a responsibility to propose substantial goals" and that "goals should reflect the desirability of meeting a significant percentage of identified needs at an early date."[387] The National Committee Against Discrimination in Housing (NCDH) has criticized such a standard as well, suggesting that, in effect, communities will interpret it as the maximum effort needed to satisfy the HUD requirement to provide for assisted housing.[388] If communities, in fact, choose to interpret the standard as NCDH suggests, they would not have to meet their needs for assisted housing for 20 years. Clearly, the standard of 15 percent over a 3-year period is too low.

Additionally, HUD has not incorporated in its housing assistance plan regulations adequate requirement for HAPs to be administered in an affirmative manner toward meeting the needs of low-income minority and female-headed households.[389] Housing assistance plans are to identify the special housing needs of these households (e.g., among the total

[378] 43 Fed. Reg. 8465 (1978) (to be codified in 24 C.F.R. § 570.306).
[379] *Id.*
[380] *Id.*
[381] *Id.*
[382] *Id.* In City of Hartford v. Hills, the Federal district court concluded that HUD had abused its authority in granting community development funds to seven suburban communities in the Hartford, Connecticut, SMSA, six of whom submitted an "expected-to-reside figure" of zero. See City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976). In an appeal filed by three of the suburban communities, HUD submitted an *amicus* brief in support of the argument that the city of Hartford (and by implication, low-income residents of the city) had no standing in challenging the suburban localities' receipt of community development funds from HUD. (See City of Hartford v. Town of Glastonbury, 561 F.2d 1032 (2d Cir. 1976), reversed on rehearing *en banc* at 1048 (1977)). The Federal appeals court held in favor of the plaintiffs.

[383] 43 Fed. Reg. 8468 (1978) (to be codified in 24 C.F.R. 570.306(c)(1)(iii).
[384] Management of the CDBG Program.
[385] 43 Fed. Reg. 8468 (1978) (to be codified in 24 C.F.R. § 570.306(c)(iii)).
[386] Housing Task Force of the Leadership Conference on Civil Rights, "Comments on Proposed Regulations [on] Community Development Block Grant," November 1977.
[387] 43 Fed. Reg. 8468 (1978) (to be codified in 24 C.F.R. § 570.306(c)(1)(iii)).
[388] National Committee Against Discrimination in Housing, Inc., *Flash*, Nov. 11, 1977.
[389] The National Committee Against Discrimination in Housing had commented that HUD "remains reluctant to make specific requirements of applicants to take affirmative action to facilitate spatial deconcentration by broadening housing opportunities for minorities." Ibid.

group of low-income persons, minorities may have a particular need for large family rental units). However, HUD regulations fail to require that where the housing needs of these households have been disproportionately disregarded, the community must take special actions to meet the housing needs of these households.

2. Annual Housing Action Program

The Annual Housing Action Program describes the annual goal and the annual program of actions to facilitate the goals of the 3-year HAP. Such actions may include:

- Acquisition of sites by the locality and provision of site improvements for the development of assisted housing;
- Issuance of appropriate zoning changes, building permits, and utility connections;
- Formation of a local housing authority or execution of an agreement with a housing authority having powers to provide assisted housing within the jurisdiction of the applicant;
- Adoption or modification of local ordinances and land use measures to facilitate the development of assisted housing.[390]

Actions to facilitate the goals of the 3-year HAP must include those which address any special housing needs of minority, handicapped, and female-headed households. The Annual Housing Assistance Plan is a statutory requirement, and localities must establish timetables to meet the specified needs.

3. Community Development and Housing Plan

Under the community development block grant program, a locality is required to submit every 3 years, as part of the entitlement application, a "Community Development and Housing Plan."[391] The plan includes a narrative summary of the applicant's community development and housing needs, "particularly those of low- and moderate-income households and any special needs of minorities and women (within the total group of lower income persons)."[392]

The Community Development and Housing Plan also must contain a "Comprehensive Strategy" stating how the locality proposes to meet its identified community development and housing needs, particularly those of low- and moderate-income households residing in or expected to reside in the community and any special needs of minorities and women that may exist. The "Comprehensive Strategy" is to incorporate the major objectives that the applicant seeks to accomplish, the priorities established for the use of block grant funds, and the facts the locality has taken into account in selecting areas to concentrate community development and housing activities.[393]

In proposing how identified community development and housing needs are to be addressed, the locality is to describe a strategy for maintaining and upgrading neighborhoods affected by blight and deterioration and specifically address the issue of housing in the following manner:

(a) describe a strategy for increasing the choice of housing opportunities for low- and moderate-income persons (including members of minority groups and female-headed households) and efforts to achieve spatial deconcentration of such housing opportunities (the promotion of economic integration) and actions to further fair housing affirmatively;[394]

(b) discuss any regulatory and other actions proposed to foster housing maintenance and improvements, for example, actions undertaken to eliminate redlining (which in the denial of home improvement loans to particular areas could have the effect of perpetuating neighborhood deterioration).[395]

4. Annual Community Development Program

Each locality, as part of its annual application for funding, is to submit a Community Development Program narrative describing the projects and activities to be undertaken with program year funds. Applicants are to indicate whether projects and activities principally benefit low- and moderate-income persons, aid in the prevention or elimination of slums and blight, or meet a particular urgent need. They must describe all activities comprising each project,[396] estimating costs and time of completion, the location of projects/activities, and the amounts

[390] 43 Fed. Reg. 8468 (1978) (to be codified in 24 C.F.R. § 570.306)(b)(3)(iii)).
[391] 43 Fed. Reg. 8468 (1978) (to be codified in 24 C.F.R. § 570.304).
[392] *Id.* (to be codified in 24 C.F.R. § 570.304(a)(2)).
[393] *Id.* (to be codified in 24 C.F.R. § 570.304(b)).
[394] 43 Fed. Reg. 8465 (1978) (to be codified in 24 C.F.R. § 570.304(b)(2)(iii)).
[395] 43 Fed. Reg. 8464–65 (1978) (to be codified in 24 C.F.R. § 570.304(b)(2)(ii)).
[396] 43 Fed. Reg. 8465 (1978) (to be codified in 24 C.F.R. § 570.305(a)(4)).

and sources of other public funds and private investments anticipated to be provided.[397]

A major criticism of the Annual Community Development Program is that there is no requirement for an affirmative plan to meet the needs of low-income minorities and women even if their needs are greater than those of the entire low-income population.[398] HUD has stated that: "The statute does not permit HUD to substitute its judgement for the judgement of local authorities in the selection of activities and target areas, so long as the application meets statutory and regulatory requirements."[399]

This Commission is not suggesting, however, that HUD make the selection of activities and target areas for local authorities, but rather that HUD require that the local authorities plan action to meet low-income minority and female needs. Indeed, the 3-year Community Development and Housing Plan does require a narrative summary of any special housing and community development needs of minorities and women and a description of how the applicant proposes to meet such needs.[400] In that the Annual Community Development Program requirement is a chief method by which block grant recipients outline the actions planned each year for meeting the 3-year goals of the Community Development and Housing Plan, it is essential that there be a requirement in the Annual Community Development Program indicating the annual actions planned to meet the needs of minorities and women.

E. HUD Review of Applications

HUD bases its review of a community's block grant application upon the locality's certifications, general statements of fact and data, and other information contained in the application.

HUD's review of a community's application includes, but need not be limited to, these substantive concerns:

- Whether proposed programs and activities are of principal benefit to low- and moderate-income persons.
- The extent of coordination of housing assistance and community development activities.
- The appropriateness of proposed plans and programs to the applicant's stated needs and objectives, including those needs related to the Housing Assistance Plan.
- The applicant's capacity to carry out the program proposed as evidenced by its previous performance record.
- Compliance with other applicable laws and regulations.[401]

The Office of Community Planning and Development, in an April 15, 1977, memorandum to field staff, indicated that HUD will concentrate its review on the substantive content of block grant applications rather than simply "technical" concerns.[402] The April 15 memorandum, in part, states, "applications should be subjected to a thorough and meaningful review which goes beyond conformity with eligibility and technical requirements to consider the substance of what is proposed and how it serves statutory objectives."[403]

In the first 2 years of the block grant program, prior to issuing the April 1977 directives, HUD review of communities' applications focused primarily on technical concerns, such as whether all required documents were submitted, whether documents were submitted within the prescribed time limitations, and whether forms were completed properly. There was little emphasis placed by HUD on localities' compliance with program or equal opportunity standards. HUD had routinely accepted certification by applicants that proposed programs benefited low- and moderate-income persons. The Department also approved HAPs which described no plan to achieve housing goals and generally focused merely on whether an activity was eligible

[397] *Id.* (to be codified in 24 C.F.R. § 570.305(a)(4), (5), and (6)).
[398] Leadership Conference on Civil Rights, Housing Task Force, "Comments on Proposed Regulations [on] Community Development Block Grants," November 1977. HUD observed:

> The April 1978 memo requires that HUD's knowledge of the applicant's performance, monitoring of activities, A-95 comments, citizen complaints and other evidence shall be considered in determining whether or not specific projects may be approved. Hubachman letter.

[399] Hubachman letter.
[400] 43 Fed. Reg. 8464 (1978) (to be codified in 24 C.F.R. § 570.304(a)(2)).
[401] *Id.* (to be codified in 24 C.F.R. § 570.311(b)(2)).
[402] Management of the CDBG Program.
[403] Ibid.

EXHIBIT 1.8

Comparison of the Number of Applications Receiving Conditional Approval Before and After the April 1977 Memorandum

	Prior to memorandum		Subsequent to memorandum	
	No.	Percent of all applications	No.	Percent of all applications
Applications reviewed	175	100%	790	100%
Applications receiving conditional approval	16	9	163	21
Reasons for conditional approval				
Failure to comply with maximum feasible priority requirement	2	1	93	12
Inadequate HAP performance	1	1	35	3
Inadequate equal opportunity performance	4	2	15	2

Source: U.S., Department of Housing and Urban Development, Office of Community Planning and Development, memorandum to field offices, "Management of the Community Development Block Grant Program" (undated).

under the act—not whether the activity as implemented furthered the objectives of the act.[404]

A HUD survey comparing its own action on applications prior and subsequent to issuance of the new policy directive on substantive reviews indicated that a greater number of applications were being conditioned[405] and disapproved after the directive was issued. Exhibit 1.8 shows that, pursuant to the directive, and judging by the number of applications conditioned and disapproved, area offices apparently paid greater attention to "maximum feasible priority," housing assistance plan, and equal opportunity requirements.[406] HUD commented:

> The April 1977 memorandum to HUD field staff has had a significant impact on the applications approved since then. In 1977, nearly every urban county had to make significant program adjustments; over 292 city and county applicants were approved conditionally pending program changes, and over $70 million was shifted to activities more directly benefitting low- and moderate-income persons.[407]

In fiscal year 1977, the third year of the block grant program, HUD disapproved the entitlement applications of nine communities[408]—eight of these disapprovals were subsequent to the April 1977 policy directive.[409] In each case of disapproval, action was taken by HUD because of an inadequate Housing Assistance Plan.[410] Primarily, inadequacies included goals by "household type"; "tenure"; and relative proportion of new, rehabilitated, existing units to meet housing needs, and failure to comply

[404] Betty Adams, Chairperson, Housing Task Force, Leadership Conference on Civil Rights, statement before the Senate Committee on Banking, Housing, and Urban Affairs, Aug. 23, 1976 (hereafter cited as Adams testimony). Similar comments, indicative of HUD's failure to review the applications substantively are incorporated in separate reports and observations by the Potomac Institute, the Michigan Advisory Committee to the U.S. Commission on Civil Rights, the NAACP, the Southern Regional Council, the National Urban League, and the General Accounting Office. These were cited by the National Committee Against Discrimination in Housing at a training institute on the Housing and Community Development Act of 1974, Jan. 10, 1977.

[405] If a community's performance has been inadequate, or.: action HUD can take is to condition its approval of the community's application on the understanding that funds will be used for certain activities. For example, HUD could require a recipient to undertake a study to determine any special housing needs of low-income minorities in the community.

[406] U.S., Department of Housing and Urban Development, Office of Community Planning and Development, memorandum to field offices, "Management of the Community Development Block Grant Program" (undated) (hereafter cited as Undated Memorandum on Management of the CDBG Program).

[407] Hubechman letter.

[408] Communities whose third year applications were disapproved include: East Hartford, Conn.; Hightstown, N.J.; Millville, N.J.; Hempstead (town), N.Y.; Staunton, Va.; Livonia, Mich.; St. Joseph, Mich.; Midland, Tex.; and Pomona, Calif. Gordon McKay, Acting Deputy Director for Office of Field Operations and Monitoring, Office of Community Planning and Development, telephone interview, HUD, May 1, 1978.

[409] Undated Memorandum on Management of the CDBG Program.

[410] Ibid.

with the expected-to-reside requirement of the housing assistance plan.

A major shortcoming, reflected in the new regulations, of HUD's review of block grant applications is the "75 percent standard." Regulations state that HUD will conduct a substantive review for program benefit to low- and moderate-income persons[411] of a community's application only if the locality indicates that less than 75 percent of program funds are intended for activities principally benefiting low- and moderate-income persons.[412] HUD commented: "if over 50%, but less than 75% of the program funds benefit low- and moderate-income persons, a thorough front-end review is conducted to assure that the applications in fact principally benefit low- and moderate-income persons."[413] HUD's regulations thus imply that communities which state in their applications that 75 percent or more of their grant will be utilized for the principal benefit of low- and moderate-income persons will not receive substantive review for program benefit to low- and moderate-income persons prior to funding.

F. Grantee Performance Reports

The Housing and Community Development Act of 1974 mandates that HUD evaluate a community's compliance with all equal opportunity laws during the duration of a program through the annual Grantee Performance Report (GPR).[414] The evaluation permitted by the GPR is important for assuring compliance with civil rights requirements. Pursuant to Section 104(d) of the act,[415] HUD regulations provide that the GPR shall describe activities carried out under Title I and assess the relationship of those activities both to the objectives of Title I and to the needs and objectives identified in the grantee's Community Development and Housing Plan.[416] Specifically, the following information is required of the locality, pursuant to the Grantee Performance Report:

- Progress achieved on planned community development activities.
- The number of households, including the percentage of minority and female-headed, low-income households that have benefited from activities underway or completed with respect to physical and capital improvements and public services and assistance.
- Relocation funded under the block grant program in behalf of persons displaced from their homes as a result of other community development activities.
- The extent to which statutory objectives under the act have been met.
- The extent to which housing has been provided to low-income persons; whether the units are new, existing, or rehabilitated; whether the units are for the benefit of the elderly, families, or large families; and the number of minority and female-headed households receiving assistance.
- The location of low- and moderate-income units for which the community has made a financial commitment, indicating the extent of geographical dispersal.
- The extent of equal opportunity in community development block grant programs and activities; this includes: (a) a summary of steps taken by the locality to identify low- and moderate-income minority and female-headed household needs, as they may be greater than the low- and moderate-income population in general, (b) actions taken to correct conditions which may have limited minority participation or benefits in the past, and (c) a summary of any studies undertaken which have recommendations for assuring equal opportunity.
- Actions taken by the community to facilitate the prevention of discrimination in the sale, rental, and financing of housing.[417]

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[411] Further, other reviews are conducted. As HUD has observed:

> Eligibility determinations must be made with respect to. . .prevention and elimination of slums and blight, and urgent community development needs. In addition, the tests of other appropriate laws must be applied together with a determination by HUD as to whether or not activities proposed are plainly inappropriate to identified needs. Hubschman letter.

[412] 43 Fed. Reg. 8461 (1978) (to be codified in 24 C.F.R. § 570.302(b)(3)).

[413] Hubschman letter.

[414] 42 U.S.C. § 5304. HUD requires that each grant recipient submit the Grantee Performance Report no later than the end of the 8th month of each program year. The report is to cover a 12-month period ending with the 6th month of the program year. 43 Fed. Reg. 8473 (1978) (to be codified in 24 C.F.R. § 570.906(a)).

[415] Pub. L. No. 93-383, 88 Stat. 639 (codified at 42 U.S.C. § 5304(d) (Supp. V 1975)).

[416] 43 Fed. Reg. 8473 (1978) (to be codified in 24 C.F.R. § 570.906).

[417] 24 C.F.R. § 570.906 (1977). Note: The extensive nature of HUD's fair housing and equal opportunity requirements pursuant to the Grantee Performance Report are not reflected in the Department's GPR regulations but are outlined on the prescribed HUD form that localities submit annually. There are two additional important civil rights elements that are required in the GPR but are not for the specific purpose of providing fair housing:

- A list giving the type, the dollar value, and the race and sex of the contractor for each contract that was awarded by the city and funded in whole or in part by CDBG money.
- A summary of the recipient's employment activity—hiring, firing and

An April 1978 memorandum from the Office of Community Planning and Development directed that:

> With regard to fair housing and equal opportunity, it is especially important that the grantee's performance be assessed to determine whether the assurances and the specific requirements of the regulations are in fact being carried out. Crucial to FH&EO monitoring is the Grantee Performance Report (GPR) which indicates performance or lack of performance.[418]

The Grantee Performance Report could potentially be a major mechanism for evaluation and HUD has stated, "The GPR is viewed by the CPD program staff as a tool for monitoring recipients' performance. Progress on planned activities, as reported in the GPR, provides indications of areas of concern in local achievement of CDBG program objectives."[419] However, HUD frequently does not investigate or otherwise verify the reports' contents unless an interested person or group files a complaint about them. Even then there are no standards published by HUD for judging the adequacy of the grantee's performance. The Southern Regional Council[420] has noted that even HUD's most stringent reviews of community development applications relied primarily "on the statements of interested parties, namely the recipient governments."[421] The Housing Task Force on Civil Rights found that, in essence, "performance reports are for the most part self-serving documents prepared by communities seeking additional community development funds based on their past performance."[422]

G. Sanctions

HUD has described some of the actions it may take to ensure compliance with the Housing and Community Development Act of 1974:

> A recipient is required to undertake specific, substantive actions each year. Failure to show appropriate action or progress is a basis for corrective action. Such action includes: (1) requiring a specific assurance (rather than a certificate of assurance) which specifies performance goals and a specific timetable calling for quantifiable results within 6 months and/or (2) conditioning approval on specifications to be undertaken *prior* to draw down on funds. Conditioning may occur without prior specific assurances. If the above actions do not result in corrective or remedial action, the Area Office may recommend a grant reduction (for failure to perform) or disapproval of the application.[423]

When a community will not voluntarily correct fair housing and equal opportunity violations, the Housing and Community Development Act of 1974 clearly gives HUD the authority and responsibility to disapprove some or all of a locality's block grant application. Section 104(a)(5) of the act states that in order to obtain funding, applicants must provide satisfactory assurance that the program will be conducted and administered in conformity with Title VIII of the Civil Rights Act of 1968 and Title VI of the Civil Rights Act of 1964.[424] If a community will not come into compliance with these laws, the locality's assurances that it is in compliance cannot be regarded as satisfactory, and HUD should not approve the community's application. Beyond providing assurances, moreover, Section 104(c) of the act states that HUD may disapprove an application for funding "if the Secretary determines that the application does not comply with the requirements of this title [Title I of the 1974 act] or other applicable law. . . ."[425]

Despite HUD's authority and responsibility to disapprove funding where there are fair housing violations, HUD regulations do not encourage disapproval of block grant applications where there is noncompliance with equal opportunity assurances. Section 570.910 of HUD regulations, entitled "Corrective and Remedial Actions,"[426] states that if HUD finds noncompliance, the locality will be advised that the standard assurance will not be acceptable

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training—involving Section 3 eligibles in those agencies funded in whole or in part with CDBG monies. This summary must be broken down by salary and by race, sex and national origin. Hubachman letter.

[418] U.S., Department of Housing and Urban Development, Notice to Regional Administrators and Others, Review of Entitlement Grant Applications for Fiscal Year 1978, Apr. 28, 1978 (hereafter cited as CPD Notice 78–9).

[419] Hubachman letter.

[420] The Southern Regional Council is a private, nonprofit organization working for equal opportunity in the South through research and civil rights advocacy. Its areas of concern include housing, education, and employment.

[421] Stephen Suitts, Director, Southern Regional Council, telephone interview, May 31, 1978.

[422] Adams testimony.

[423] Hubachman letter. See also 24 C.F.R. § 570.910 and CPD Notice 78–9.

[424] Pub. L. No. 93–383, 88 Stat. 638 (codified at 42 U.S.C. § 5304(a)(5) (Supp. V 1975)).

[425] Pub. L. No. 93–383, 88 Stat. 639 (codified at 42 U.S.C. § 5304(c) (Supp. V 1975)). Section 104(c) of the 1974 Housing and Community Development Act provides two other bases for disapproval, as well:

- The application's description of community and housing needs is plainly inconsistent with significant facts and data which are generally available;
- The proposed activities are plainly inappropriate to meeting the identified needs and objectives. Hubachman letter.

[426] 24 C.F.R. § 570.910 (1977).

and that additional information or assurances will be required.[427] These additional assurances are acceptable to HUD despite the fact that they are being required only because the locality did not comply with equal opportunity assurances in the prior year. HUD has commented:

> The assertion that HUD should disapprove a CDBG application from a community with a known pattern of noncompliance ignores the other remedies which may be applied by HUD. These other remedies can include contract conditioning, reduction of the grant, technical assistance and guidance, and warning letters. These remedies can often result in improvements in the facility's performance on Title VI and Title VIII without depriving persons of low- and moderate-income of the benefits of the CDBG program. Nearly 300 CDBG applications (about 22%) were conditioned in the past year to improve recipients' adherence to the laws governing this program. . . .
>
> HUD management of the CDBG program is aimed at targeting funds to low- and moderate-income persons. Use of the disapproval sanction in cases of FH&EO noncompliance is rarely needed given the other remedies available. Rather than disapproving a grant, HUD believes it may be better, where possible, to condition approvals in order to deliver program benefits to low- and moderate-income families while at the same time obtaining necessary corrections.[428]

The problem has been, however, that there have been major instances in which HUD's administration of the block grant program has not resulted in significant improvement in civil rights compliance. Indeed, the major weakness of HUD's implementation of the community development block grant program is its lenient posture with respect to localities that fail to comply with equal opportunity and related program regulations. HUD's position reflects its philosophy in dispensing community development funds—of providing assistance "with maximum certainty and minimum delay."[429]

Although HUD's administration of equal opportunity and program standards has improved in the third block grant year, as evidenced by the new emphasis on reviews of a substantive nature and clarifications of regulatory ambiguities,[430] the Department has continued to approve applications which do not meet established equal opportunity and program standards.

Since passage of the Housing and Community Development Act of 1974, HUD has never disapproved a community development application for failure to comply with equal opportunity standards.[431] In fiscal year 1977, the third year of the block grant program, the Department rejected nine applications,[432] as compared with eight in fiscal year 1976 and three in fiscal year 1975.[433] Each disapproval has been the result of an "inadequate Housing Assistance Plan"; i.e., failure to establish housing goals to meet identified needs (particularly for low-income families) or failure to comply with "expected-to-reside" requirements.[434] HUD has also stated that where an application was "rejected because of an inappropriate HAP, it was unnecessary to assert additional grounds for rejection."[435]

HUD's position, however, does not reflect its full equal opportunity responsibilities under the Housing and Community Development Act of 1974. In this Commission's view, a finding of an inadequate HAP should not negate HUD's determination of whether there have also been civil rights violations. If a community has an inadequate HAP and also persistently fails to practice fair housing in violation of assurances which it has offered in earlier years, it is important that the community be rejected for both reasons. If it should be rejected only because of its inadequate HAP, the only action the community must take to be reinstated in the block grant program is to revise its HAP. No corrections of the fair housing violations and no affirmative steps to ensure against future discrimination will be mandated.

HUD's failure, as of the fourth year of the program, to reject any community development

[427] Ibid. See also the April 15, 1977, memorandum from the Office of Community Planning and Development stating that where a grantee (applicant) has been previously advised that it is not in compliance with equal opportunity or affirmative action requirements and it has not taken "sufficient action" to remedy the noncompliance, the standard equal opportunity certification should not be accepted. In this case, the applicant must provide specific assurances, progress schedules, and other information. Management of the CDBG Program.

[428] Hubschman letter.

[429] U.S., Department of Housing and Urban Development, *Community Development Block Grant Program ; Second Annual Report* (December 1976), p. 15.

[430] Management of the CDBG Program.

[431] McKay telephone interview, May 1, 1978.

[432] Ibid.

[433] Ibid.

[434] Ibid.

[435] Hubschman letter. The application in question was from Parma, Ohio. That application is discussed below.

applications based on failure to comply with fair housing requirements and equal opportunity standards indicates that it has not firmly administered its civil rights enforcement responsibilities. A significant illustration is that of Parma, Ohio. In 1973 HUD recommended that the Department of Justice file a Title VIII lawsuit against the city and its officials. Subsequently, in reviewing Parma's first year community development application, HUD's Office of the General Counsel concluded that city officials were still in violation of Title VIII and specifically that the community's rejection of subsidized housing was done with "the purpose and intent to exclude black people. . . ." HUD also found that the community's Housing Assistance Plan was inadequate because the city's goal for housing assistance, which was zero, did not meet the community's low-income housing need for 1,537 units.[436] Parma's first year application was rejected by HUD. But the rejection was based only on an inadequate Housing Assistance Plan, despite HUD's finding that Parma was in violation of Title VIII.[437]

Similarly, in Lynn, Massachusetts, HUD's Boston Area Office approved the city's second and third year block grant applications despite serious fair housing and equal opportunity deficiencies. The Director of Fair Housing and Equal Opportunity in the Boston Area Office found the following violations in reviewing Lynn's second year application: (1) the grantee did not document any actions undertaken to further fair housing, as required by the Grantee Performance Report, (2) the locality did not report minority household data for all activities as required, and (3) the community did not demonstrate the required affirmative action in minority and female employment in areas funded by community development block grant funds.[438] As a result of the locality's failure to document any actions undertaken to further fair housing, the Director of Fair Housing and Equal Opportunity commented that the community's actions did not reflect that it had complied with the fair housing certifications of the block grant program regulations.[439] He also recommended that the second year application not be approved until the applicant submitted additional information with specific actions to be taken to address noted deficiencies.[440]

In response to the recommendation of the Director of Fair Housing and Equal Opportunity, program staff[441] responded that, although the equal opportunity review "indicates a degree of noncompliance with certain rules and regulations, those concerns are not sufficient to cause disapproval, adjustment, or conditioning of the community's second year grant."[442] Program staff recommended approval, which was granted. At that time, the only action the area office took to secure compliance was to require Lynn to submit within 20 days a list of steps taken to comply with the equal opportunity certification.[443] Although that request was made in July 1976, Lynn did not submit the required information until June 1977, just prior to submission of its third year application.[444] In the interim, HUD took no action to enforce compliance by the community except to issue a letter of warning to the community relative to the Department's July 1976 request for equal opportunity information in May 1977—10 months after the request.[445]

After reviewing Lynn's third year application, the Director of Fair Housing and Equal Opportunity commented:

> The applicant was notified of deficiencies last year. We have now determined that the City has not demonstrated adequate efforts during the second program year to remedy these deficiencies. . . . We [the Office of Fair Housing and Equal Opportunity] therefore recommend. . .that . . .approval. . .include a warning which incorporates the recommended actions to be taken to remedy these deficiencies. . . .[446]

[436] David O. Meeker, Jr., Assistant Secretary for Community Planning and Development, HUD, letter to John Petruska, Mayor, Parma, Ohio, June 13, 1975.

[437] The city of Parma did not apply for participation in the second and third years of the block grant program.

[438] James R. Turner, Jr., Director of Fair Housing and Equal Opportunity, HUD Boston Area Office, memorandum to John C. Mongan, Director, Program Planning and Support Branch, Office of Community Planning and Development, Boston Area Office, HUD, "Fair Housing/Equal Opportunity Review, re: Lynn, Massachusetts," June 16, 1976.

[439] Ibid.

[440] Ibid.

[441] In this case, program staff were Boston Area Office staff responsible for administering the block grant program.

[442] James A. Feeley, Director, Community Planning and Development, memorandum to William H. Hernandez, Director, Boston Area Office, "Annual In-House Review, Recommendation of Approval, re: Lynn, Massachusetts" (undated, sent between June 28 and June 30, 1976).

[443] James A. Feeley, Director, Community Planning and Development, Boston Area Office, HUD, memorandum to Antonio Marino, Mayor, Lynn, Massachusetts, July 9, 1976.

[444] Administrative Complaint regarding Lynn, Massachusetts (filed by the National Committee Against Discrimination in Housing), May 1976.

[445] Ibid.

[446] James R. Turner, Jr., Director, Office of Fair Housing and Equal Opportunity, memorandum to Robert Paquin, Director, Office of Community Planning and Development, Boston Area Office, HUD, "Fair

Nonetheless, Lynn's third year application was unconditionally approved by the Boston Area Office, despite these comments.[447] As in the second year, program staff acknowledged fair housing and equal opportunity violations, but indicated that such violations were not sufficient to warrant remedial or corrective action.[448] The Director of Community Planning and Development at the Boston Area Office commented that: "If corrective action [by the recipient] does not occur within a reasonable time period, we will consider imposing more serious sanctions."[449] The Area Office Manager concurred.[450]

The Lynn case history is significant. It indicates disregard for the April 1977 policy guidelines of the Assistant Secretary for Community Planning and Development.[451] This is particularly evident with regard to Lynn's third year application, which was approved with its equal opportunity deficiencies despite instructions to field staff in the April 1977 memorandum to scrutinize grantees closely on equal opportunity performances.

The Lynn case also reveals conflict between program and equal opportunity staffs over enforcement of equal opportunity standards. In this case, the recommendation by the Director of Fair Housing and Equal Opportunity at the area office for disapproval of the locality's second year block grant application was overruled. Despite the fact that deficiencies identified by HUD in the city's second year application remained uncorrected, in the third year the Director of Fair Housing and Equal Opportunity simply recommended to the area director that approval of Lynn's third year application include a warning. Even that recommendation was not accepted.[452]

A program staff member at HUD's central office has stated that equal opportunity and program staff in the field office are in frequent conflict over the recommendations equal opportunity staff make for disapproving applications because either: (1) their recommendations have no statutory basis, or (2) although equal opportunity staff have evidence which might warrant disapproval, they fail to present the evidence in a manner that makes it clear that a statutory violation exists.[453] Simultaneously, however, there is also the view that the conflict is caused, at least in part, because some program staff in HUD's area offices have no regard for equal opportunity requirements. For example, in at least one *On-site Operational Performance Evaluation*, HUD found that "relationship problems arose between FHEO and CPD."[454] The HUD central office found that "there is. . .a need for a closer working relationship and a more general awareness of the FHEO requirements by HUD staff and recipients."[455] The Department of Justice has commented that "program personnel who view their primary function as disbursing funds are reluctant to see this process disrupted, and civil rights enforcement is viewed as a potential source of problems in this regard."[456] Area office equal opportunity staff sometimes perceive that both program staff and the area director habitually reject equal opportunity recommendations for the conditioning or disapproval of block grant applications. This perception, in turn, leads equal opportunity personnel at the area level sometimes to pursue a policy of least resistance.

Another example of HUD's leniency in approving community development block grants with fair housing and equal opportunity deficiencies is the approval of the city of Philadelphia's third and fourth year applications. In the third block grant year, HUD's Office of Fair Housing and Equal Opportunity found that in the previous 2 years of the program:

- The city had failed to provide "reasonable choices" for families in need of assisted housing. (All 132 new and rehabilitated Section 8 family housing units under commitment or construction were in minority areas; under the Section 8 existing program, administered by the Philadelphia Public Housing Authority, only 46 of 521 families participating in the program—as of

Housing/Equal Opportunity Annual In-House Review re: Lynn, Mass.," June 17, 1977.

[447] Ibid., June 22, 1977.

[448] Robert Paquin, Director, Office of Community Planning and Development, memorandum to Marvin Siflinger, Acting Director, Boston Area Office, HUD, "Annual In-House Review, re: Lynn, Mass." (undated, sent between June 17 and June 20, 1977).

[449] Ibid.

[450] Marvin Siflinger, Acting Director, Boston Area Office, HUD, letter to Antonio Marino, Mayor, Lynn, Mass., notification of decision to approve application, June 27, 1977.

[451] Management of the CDBG Program.

[452] James R. Turner, Jr., Director, Office of Fair Housing and Equal Opportunity, memorandum to Robert Paquin, Director, Office of Community Planning and Development, Boston Area Office, HUD, June 22, 1977.

[453] Ronald Halpern, Desk Officer for San Francisco and Dallas HUD regions, Office of Community Planning and Development, HUD, interview, Nov. 25, 1977.

[454] *HUD On-Site Operational Performance Evaluation* (New York).

[455] Ibid.

[456] *DOJ Interagency Survey Report*, p. 22.

December 1976—had moved from minority areas into nonminority areas.

• The city had failed to make sufficient progress in meeting the housing assistance needs of families. (Although the city met 69 percent of its goal for elderly housing units, only 32 percent of its total family goal for rental housing was met; minorities represent 56 percent of the family need and only 30 percent of the elderly need.)

• The city had failed to take sufficient action to prevent discrimination in the sale, rental and financing of housing, given the segregated nature of the local housing market.[487]

FHEO stated that "evidence challenge[d] the validity of the City of Philadelphia's certificate of assurance to Title VIII."[488] Pursuant to these findings and that of the Federal district court in *Resident Advisory Board* v. *Rizzo,* [489] FHEO recommended to HUD's Office of Community Planning and Development (COD) at the Philadelphia Area Office that the city be made to comply with certain conditions prior to expenditure of funds under the third year block grant program, including:

• The city must promote maximum choice in assisted housing locations. To ameliorate the imbalance maintained because of minimal progress in providing assisted family housing units, there must be 200 family units of Section 8 New or Substantial Rehab or Public Housing under commitment in nonimpacted areas.

• The city must accept full responsibility for locating at least 50 percent of all new and rehabilitated family units in the coming program year in areas in which minorities are not already concentrated. Of these, at least one-half must be under commitment within 6 months of the program year.

• The city must contract with an independent and experienced fair housing or civil rights organization to further affirmatively fair housing in the sale and rental of housing within the city's housing market and to expand geographic housing choices of minority residents. Services to be performed by the organization shall include but not be limited to the provision of comprehensive counseling to certicate holders, outreach to owners, and affirmative marketing guidance to developers. The city is also to pursue an aggressive program of education, counseling, testing and/or litigation to combat discrimination in the private housing market.[490]

The Office of the Regional Counsel in Philadelphia concurred with the recommendations of Fair Housing/Equal Opportunity and agreed that certain conditions should be addressed by the city prior to funding.[491] The Regional Counsel also concluded that the city's community development block grant activities did not give "maximum feasible priority" to low- as well as moderate-income people. In fact, the Counsel acknowledged that Philadelphia's application could be "legally disapproved" on that basis.[492]

Nonetheless, HUD conditionally approved Philadelphia's third year application prior to any commitment from the city to comply with those conditions attached to the approval.[493] In the letter of conditional approval submitted to the city, HUD incorporated only in summary form the recommendations of the Office of Fair Housing/Equal Opportunity and deleted reference to that part of FHEO's recommen-

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[487] Chester C. McGuire, Assistant Secretary for Fair Housing and Equal Opportunity, memorandum to Robert C. Embry, Jr., Assistant Secretary for Community Planning and Development, HUD, "Fair Housing and Equal Opportunity Requirements; 1977 CDBG Program, Philadelphia, Pennsylvania," Apr. 29, 1977 (hereafter referred to as McGuire memorandum).

[488] Ibid.

[489] In Resident Advisory Board v. Rizzo, the Federal district court ruled that the city of Philadelphia, the Redevelopment Authority of the City of Philadelphia, and the Philadelphia Housing Authority were in violation of Title VIII. The court specifically concluded the following:

> in view of the pattern of racial segregation which prevail[s] in both private and public housing, the City of Philadelphia has not. . .met its duty of affirmatively implementing the national policy of fair housing and has violated Title VIII of the Civil Rights Act of 1968. . . .
>
> evidence. . .establishes that the City of Philadelphia acted with a racially discriminatory purpose in halting the Whitman Park Townhouse Project (a local subsidized housing project proposed to be constructed in a nonminority neighborhood). . . .
>
> the City of Philadelphia maintains a racially segregated low-income public housing system. Resident Advisory Board v. Rizzo, (D.C., E.D., Pa.) CA No. 71-1575, Decided Nov. 3, 1976.

[490] McGuire memorandum.

[491] William F. Hall, Jr., Regional Counsel for Region III, Philadelphia, Pa., memorandum to Terry Chisolm, Acting Director of Operations and Monitoring, Office of Community Planning and Development, HUD, May 1978.

[492] Ibid.

[493] In responding to FHEO, and in declining to compel the city to meet certain fair housing/equal opportunity conditions prior to approval of the application, CPD stated:

> Unfortunately, since the issues giving rise to recommendations from both your staff and the staff of the Philadelphia Area Office with respect to the provision of expanded housing choice for low- and moderate-income persons have only recently been made known to the city, we do not believe that it would be appropriate to withhold all funds from the city pending appropriate action with respect to housing production and affirmative marketing activities. Robert C. Embry, Jr., Assistant Secretary for Community Planning and Development, memorandum to Chester C. McGuire, Assistant Secretary for Fair Housing and Equal Opportunity, HUD, re: "Fair Housing and Equal Opportunity Recommendations Regarding the Third Year Philadelphia, Pennsylvania, Block Grant Application," May 16, 1977.

dations which contained specific courses of action for the city to pursue and time schedules for completing those actions. Specifically, HUD refused to impose any numerical guidelines upon the city, e.g., the approximate number and proportion (elderly, family, or large family) of newly constructed assisted housing to be available in racially nonimpacted areas[466] (FHEO had recommended a time period of 6 months for the city to have 200 family units in nonimpacted areas.)[466] HUD also refused to impose timetables upon the city in providing for assisted housing units in nonimpacted areas.[466] (FHEO had recommended a time period of 6 months for the city to have 200 units under commitment.[467]) Although FHEO recommended specific actions to be taken by the city to facilitate an affirmative fair housing marketing program, HUD deleted the specifics of what would constitute an affirmative marketing program in its conditional approval of the grant;[468] HUD required only that the city develop a "marketing procedure to be relative to outreach activities. . .[with] particular emphasis. . .placed upon potential minority tenants."[469] Although the FHEO affirmative fair housing marketing plan included both the sale and rental of dwelling units,[470] HUD's requirement for the city to develop an affirmative plan incorporated only rental units.[471]

One year after the imposition of funding conditions on the approval of Philadelphia's third year block grant application, the city had not complied with any of those conditions.[472] However, Philadelphia's fourth year application was conditionally approved by HUD,[473] imposing timetables for the first time for the city to meet fair housing/equal opportunity goals.[474]

Although through the third year of the block grant program the city had not evidenced compliance with the assurances it had signed, HUD also provided funding to Philadelphia for the Urban Development Action Grant Program on the strength of an agreement by the city to comply with Section 109 of the Housing and Community Development Act of 1974. HUD informed this Commission:

> After the Section 109 findings of apparent noncompliance were put in final form, Assistant Secretary Embry notified Mayor Rizzo, in a letter dated May 1, 1978, that the City would not be eligible for UDAG until the City signed a compliance agreement addressing the nine areas raised by the findings.
>
> The Compliance Agreement was signed by the City on June 19, and by Assistant Secretary McGuire for HUD on June 20, 1978.[475]

In approving the third and fourth year community development block grant applications of the city of Philadelphia, despite the city's failure to comply with Title VIII assurances and failure to comply with previously imposed conditions, HUD failed to comply with Section 104(c) of the act[476] requiring grantee compliance with civil rights laws. The Philadelphia case also illustrates the conflict that exists between HUD fair housing/equal opportunity and program staff over the enforcement of equal

[466] Robert J. Clement, Acting Area Director, HUD Philadelphia office, letter to Frank L. Rizzo, Mayor, city of Philadelphia, May 13, 1977 (hereafter cited as Clement letter).
[466] McGuire memorandum.
[467] Clement letter.
[468] McGuire memorandum.
[469] Clement letter.
[470] Ibid.
[470] McGuire memorandum.
[471] Clement letter.
[472] Maurice Morgan, Director, Fair Housing and Equal Opportunity, HUD, Philadelphia Area Office, telephone interview, June 6, 1978.
[473] HUD commented that:

> [T]he report should note that seven conditions on the fourth year CDBG grant were imposed to ensure that the City would use available housing subsidies in non-impacted areas. Among the conditions was the requirement that the City submit an affirmative fair housing plan for all agencies in the City prior to drawing down any fourth year funds. Other conditions are:
> • identification and provision of non-impacted sites for subsidized, non-elderly rented units, which, when combined with units provided by FY '77 funds, will bring the City into compliance with conditions imposed in the Year III Block Grant Agreement;
> • upon committing a sufficient number of units to meet the Year III conditions, construction of at least 50% of all subsequent family units in non-impacted areas;
> • application for all subsidized units made available for the City;
> • submission of a quarterly report on progress in achieving the HAP goals for:
> —Community Development Rehabilitation
> —Rehabilitation Grants
> —Urban Homesteaders;
> • prohibition on spending funds on public services until the Neighborhood Strategy Areas are revised to conform with HUD requirements limiting public services to NSA's of concentrated Block Grant funded activities; and
> • in addition, should the City take actions that unreasonably prevent the development and/or construction of subsidized, non-elderly rental units, appropriate sanctions regarding the FY '78 or FY '79 grant will be applied. Hubachman letter.

[474] In May 1978 HUD completed a Title VI compliance review of the city of Philadelphia. The review uncovered several instances of "apparent noncompliance" in the city's administration of its housing and urban development programs and community services. Chester C. McGuire, Assistant Secretary for Fair Housing and Equal Opportunity, letter to Frank L. Rizzo, Mayor of Philadelphia, "Finding of Apparent Noncompliance, HUD Civil Rights Compliance Review, City of Philadelphia, Pennsylvania," Case No. 03-77-67-025 (340), May 2, 1978.
[475] Hubachman letter.
[476] 42 U.S.C. § 3101 (Supp. V 1975).

opportunity requirements. The city's continued funding, despite numerous civil rights deficiencies reflected in the manner in which the community development block grant program is administered, appears not to be a case of FHEO's failure to document those deficiencies or inability to point to statutory violations, but HUD's repeated failure to accept well-documented findings of discrimination and its lack of sensitivity toward civil rights requirements.

VII. Voluntary Compliance

The major fair housing activity of the Office of Voluntary Compliance is to negotiate agreements between the housing industry, community groups, and the Government to facilitate fair housing. HUD negotiated one voluntary affirmative marketing agreement with the National Association of Realtors (NAR). All local real estate boards and State associations affiliated with the NAR were then urged to endorse that agreement. As of August 1978, 439 local boards had signed the agreement voluntarily, in addition to 23 State associations.[477]

HUD noted, too:

> One of the most significant programs consummated by the Office of Voluntary Compliance is a voluntary national agreement with the National Association of Real Estate License Law Officials (NARELLO).
>
> The agreement provides for a strong affirmative fair housing action program with those real estate license commissions in the fifty States that endorse it. Moreover, the Office of Voluntary Compliance has negotiated National Affirmative Marketing Agreements with the National Association of Home Builders and the National Association of Real Estate Brokers.[478]

HUD views voluntary agreements as a device to enable the real estate industry, the community, and the Federal Government to "develop a collective strategy to support fair housing laws."[479] HUD also reports that voluntary agreements promote good will between the housing industry and minority groups, and promote voluntary compliance with civil rights laws, thereby enhancing awareness of and respect for these laws.[480] HUD's view of the effectiveness of voluntary agreements is not widely shared by fair housing groups, however. For example, the Housing Task Force of the Leadership Conference on Civil Rights has stated:

> Our major criticism [of voluntary agreements] runs to the scope of these agreements which is limited to the agreement by major members of the housing industry to obey the law. . .we view these voluntary agreements as failing to meet even HUD's own requirements including their regulations governing affirmative action.[481]

The National Committee Against Discrimination in Housing (NCDH) found that voluntary agreements may contain commitments to do even less than what the law requires. The president of NCDH has commented:

> In most of these [voluntary] plans and agreements, there is confusion as to what HUD's role is relative to the enforcement of Title VIII and related legislation. This becomes particularly ominous when. . .what is agreed to is less than what is provided for in law.[482]

In a study of 16 randomly selected voluntary plans, conducted by NCDH, that organization found: 15 plans contained no declaration against redlining; 14 plans failed to identify existing discriminatory practices; 11 plans did not require signatories to develop minority occupancy goals for each project; 8 plans provided for no monitoring by HUD; and 8 plans required no detailed recordkeeping of sales and rentals by race.[483] This study provides impressive evidence that deficiencies in voluntary plans are numerous and that such plans are not effective instruments to facilitate fair housing.

Finally, the monitoring of voluntary agreements has been inadequate. The Office of Voluntary Compliance has no staff of its own at the regional

[477] Hubschman letter.
[478] Ibid.
[479] U.S., Department of Housing and Urban Development, *Voluntary Affirmative Marketing Agreements* (May 1977).
[480] Ibid.
[481] Housing Task Force, Leadership Conference on Civil Rights, "Bill of Particulars in HUD Equal Opportunity Program," presented to HUD in October 1974.
[482] Robert C. Weaver, President, National Committee Against Discrimination in Housing (NCDH), at the Second Annual Housing Conference, sponsored by NCDH and the Southern Regional Council, Atlanta, Ga., Sept. 26, 1974 (hereafter cited as Weaver testimony). Mr. Weaver restated this position in testimony before the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, Mar. 9, 1976.
At least one HUD regional office has been equally critical of the Department's administration of voluntary agreements. HUD Chicago Regional Office, *An Evaluation Report: The Impact and Performance of Affirmative Fair Housing Marketing in Region IV.*
[483] Weaver testimony.

level although in fiscal year 1977 it requested a minimum of one staff member per region. Currently, activities of this office at the regional level are conducted by Field Support and Evaluation divisions. In the fiscal year 1979 regional operating plan,[484] however, no staff hours were calculated for those divisions for conducting voluntary compliance activities.

[484] The regional operating plan, negotiated between the relevant office at HUD central and the Regional Administrator, serves as a guideline for the allocation of staff time at the regional level.

Chapter 2

DEPARTMENT OF JUSTICE

Civil Rights Division
Housing and Credit Section

Summary

The Department of Justice's fair housing enforcement authority emanates from a number of sources, including Title VIII of the Civil Rights Act of 1968, Title VI of the Civil Rights Act of 1964, the Equal Credit Opportunity Act (ECOA), the Housing and Community Development Act of 1974, and Executive Order 11,063. Most of the Section's litigation in its 10-year existence, however, has been brought pursuant to Title VIII of the Civil Rights Act of 1968.

The Housing and Credit Section has established an impressive qualitative litigation record. It has consistently been successful in its efforts to obtain relief in fair housing cases, both by means of consent decrees and through contested litigation. In the entire course of its existence the Section has lost, on the merits, only two cases. As a result, the Section has helped establish a positive body of case law in a number of subject matter areas affecting fair housing, including a defendant's duty to take affirmative action to correct the present effects of past discrimination and an employer's liability for housing discrimination practiced by his or her employees.

The Housing and Credit Section is, however, impeded in accomplishing more for fair housing as a result of a number of factors. First, the Section is, in the Commission's view, far too small. Housing discrimination remains widespread in this country. As the sole Federal entity specifically assigned Title VIII enforcement responsibility, the Section needs to be able to bring considerably more litigation than the slightly more than 300 cases it has brought to date. This requires a significant increase in legal and paralegal staff. Nevertheless, the Department has not been forceful in seeking more staff. Second, the Section does not have a sufficiently comprehensive strategy for identifying and targeting major violations of Title VIII which warrant lawsuit by the Government. While the Section makes diligent efforts to keep in contact with potential sources of complaints, including other Federal agencies and civil rights organizations, it has made only limited use of other reliable indicators of discrimination, such as statistics and testing, to identify potential defendants. Third, the Section is hampered in bringing litigation by the Department's time-consuming internal procedures for review and approval of cases recommended by Section staff for litigation, particularly in cases raising complex or politically sensitive issues.

The Housing and Credit Section has further limited its overall effect by the types of cases which it has selected for suit. Much of the Section's litigation has been concentrated on discrimination in apartment rentals and racial steering. Fewer cases have been initiated involving issues such as mortgage and insurance redlining and exclusionary zoning. Moreover, notwithstanding intensive efforts to find housing discrimination complaints from

Hispanics, the Section continues to encounter difficulty in identifying strong cases for litigation. The Section's recently announced priorities, however, do strongly emphasize all of these areas for increased future activity.

The Section's program for monitoring compliance with its consent decrees and court decisions represents a successful undertaking. The monitoring unit within the Section could serve as a model for similar efforts elsewhere in the Department of Justice and at the legal offices of other Federal agencies.

Within the Department, lack of coordination and consistency of positions between the Housing and Credit Section of the Civil Rights Division and the Civil Division continues to present the potential for conflict. The Department, moreover, persists in having the Civil Division defend Federal agencies and officials in cases raising fair housing issues, although the Department's own regulations clearly dictate that such actions are the province of the Civil Rights Division.

I. Equal Housing Responsibilities of the Department of Justice

The Department of Justice has responsibility for the promotion of fair housing under several statutes and an Executive order.[1] In the main, those responsibilities have been delegated to the Housing and Credit Section of the Civil Rights Division.[2]

A. Title VIII of the Civil Rights Act of 1968

The Department of Justice is the only unit of the executive branch that is assigned enforcement authority under Title VIII of the Civil Rights Act of 1968.[3] Specifically, Title VIII provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.[4]

The Attorney General may exercise this authority on the basis of information provided by aggrieved individuals or on the basis of independent investigations conducted by the Department of Justice.[5] Title VIII has been the legal basis for most housing discrimination cases filed by the Housing and Credit Section and its predecessor, the Housing Section.[6]

B. The Equal Credit Opportunity Act

The Attorney General is authorized to institute a civil action on the basis of referrals from other

[1] In responding to a draft version of this chapter, the Chief of the Housing and Credit Section observed:

> I have carefully read the most recent draft prepared by the staff of the U.S. Commission on Civil Rights about the work of our Section. My basic reaction to the draft is that it contains some useful material, including a number of constructive suggestions from which we can learn something. I also appreciate the kind words that have been said about the quality of our legal work. Unfortunately, however, the quality of the draft is impaired, at least in my view, by some important factual errors and by conclusions which I believe to be premised on incorrect factual assumptions.
>
> I also believe that, as a whole, the draft lacks appropriate balance, in that it contains a consistent pattern of emphasis on the Section's perceived shortcomings and deemphasis of its accomplishments. There have been a number of instances, detailed in the text in which the views of persons interviewed by the Commission staff have been significantly misstated and converted from laudatory to negative. As a result, the draft fails to reflect what I regard as the general view in the fair housing community—a view recognized by the Commission in two previous studies, one published, one unpublished—that our Section has been for many years an outstanding agency in fair housing enforcement in terms of the quantity and quality of its work. Frank E. Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, memorandum to Drew S. Days, III, Assistant Attorney General, Civil Rights Division, Department of Justice, Oct. 11, 1978, p. 1 (hereafter cited as Schwelb memorandum).

Every effort has been made to present a balanced view of the Housing and Credit Section. The Commission has closely reviewed the comments provided by the Section Chief. These comments contained a number of statements about the Section's positive achievements, and these have been added to this chapter. The Commission has also corrected factual inaccuracies, and where the Commission and the Housing and Credit Section differ, the Commission has incorporated throughout the chapter the positions expressed by the Department as well as this Commission's own perspective.

[2] See section IV of this chapter for a discussion of other units within the Department that have fair housing-related responsibilities.

[3] 42 U.S.C. §§ 3601–3619, 3631 (1970) and (Supp. V 1975). For a discussion of the responsibilities of other Federal agencies under Title VIII, see the other chapters in this report.

[4] 42 U.S.C. § 3613 (1970).

[5] Drew S. Days, III, Assistant Attorney General, Civil Rights Division, Department of Justice, Statement Concerning Fair Housing, H.R. 3504 and H.R. 7787, Before the Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, House of Representatives, Feb. 9, 1978, p. 16 (hereafter cited as Days statement).

[6] Frank E. Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, interview, Jan. 20, 1978 (hereafter cited as Jan. 20, 1978, Schwelb interview).

Federal agencies with Equal Credit Opportunity Act (ECOA)[7] enforcement responsibility and independently to initiate a civil action for "pattern or practice" violations by creditors. Specifically, ECOA provides:

> When a matter is referred to the Attorney General pursuant to subsection (g) of this section, or whenever he has reason to believe that one or more creditors are engaged in a pattern or practice in violation of this subchapter, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.[8]

The Attorney General received this authority to file suit under ECOA in March 1976. It is not dependent upon the receipt of complaints or referrals from other Federal agencies.

C. Additional Fair Housing Authorities

In addition to Title VIII and ECOA, a number of other authorities permit the Attorney General to implement equal housing opportunity. These are Title VI of the Civil Rights Act of 1964,[9] the Housing and Community Development Act of 1974,[10] Executive Order No. 11,063,[11] and Section 1982 of the Civil Rights Act of 1866.[12]

1. Title VI of the Civil Rights Act of 1964

Although responsibility for enforcing Title VI of the Civil Rights Act of 1964 rests with the Federal agencies which provide assistance to recipients, Title VI provides that compliance may be effected by the termination of assistance or "by any other means authorized by law."[13] This phrase has been interpreted to mean that the responsible agency should consult with the Department of Justice whenever court action appears necessary for the enforcement of the Title VI provision against discrimination.[14] Where an agency providing Title VI assistance determines, after consultation with the Department of Justice, that litigation is the appropriate means of enforcement, it may refer the matter to the Attorney General for the purpose of commencing a civil action.[15] However, unlike Title VIII and ECOA, Title VI does not confer independent authority for the Attorney General to initiate a civil action.

2. The Housing and Community Development Act of 1974

The Attorney General also has enforcement responsibilities under the Housing and Community Development Act of 1974. Although the Secretary of Housing and Urban Development (HUD) is the major enforcer of the act,[16] the Attorney General has authority to receive referrals of violations from the Secretary of HUD and independently to initiate a civil action in "pattern or practice" cases. Section 109(c) of the act states:

> When a matter is referred to the Attorney General pursuant to subsection (b) of this section or whenever he has reason to believe that a State government or unit of general local government is engaged in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in any appropriate United States district court for such relief as may be appropriate, including injunctive relief.[17]

3. Executive Order No. 11,063

Although the enforcement responsibilities under Executive Order No. 11,063 are dispersed throughout all departments and agencies in the executive branch of the Federal Government,[18] the Attorney General is given express power to act upon referrals:

> In appropriate cases executive departments and agencies shall refer to the Attorney General violations of any rules, regulations, or procedures issued or adopted pursuant to this order, or violations of any nondiscrimination provisions included in any agreement or contract, for such civil or criminal action as he may deem appropriate.[19]

However, the Department of Justice views this order as "more or less obsolete because of the far broader coverage of Title VIII."[20]

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[7] 15 U.S.C. §§ 1691–1691f (1976).
[8] 15 U.S.C. § 1691e(h) (1976).
[9] 42 U.S.C. §§ 2000d–2000d–6 (1970).
[10] 42 U.S.C. §§ 5301–5317 (Supp. V 1975).
[11] Exec. Order No. 11,063, 3 C.F.R. 652 (1959–1963 Compilation).
[12] 42 U.S.C. § 1982 (1970).
[13] 42 U.S.C. § 2000d–1 (1970).
[14] See the Attorney General's "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," 28 C.F.R. 50.3(c) (1977).
[15] See U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. VI, *To Extend Federal Financial Assistance* (1975), p. 86 (hereafter cited as *To Extend Federal Financial Assistance*); see also, Guidelines for the Enforcement of Title VI.
[16] 42 U.S.C. § 5309(b) (Supp. V 1975).
[17] 42 U.S.C. § 5309(c) (Supp. V 1975).
[18] Exec. Order No. 11,063, 3 C.F.R. 652 (1959–1963 Compilation).
[19] *Id.* at 655.
[20] Frank E. Schwelb, Chief, Housing and Credit Section, Civil Rights

4. Section 1982 of the Civil Rights Act of 1866

The Department of Justice filed an *amicus curiae* (friend of the court) brief in *Jones* v. *Alfred H. Mayer Co.*, in which the United States Supreme Court decided that Section 1982 was a valid exercise of congressional power under the 13th amendment to eliminate "badges and incidents of slavery," including all racial discrimination in private as well as public housing.[31] Unlike Title VIII, Section 1982 does not authorize the Attorney General to initiate civil actions independently; the Department is limited to participation in private actions brought pursuant to the statute.

II. Staffing and Organization

The Housing and Credit Section is one of 10 litigating sections in the Civil Rights Division at the Department of Justice. The other nine sections are the Appellate Section, the Criminal Section, the Education Section, the Employment Section, the Federal Programs Section, the Special Litigation Section, the Voting Section, the Office of Indian Rights, and the Sex Discrimination Task Force.

The original Housing Section of the Civil Rights Division was formed in October 1969, as part of a reorganization of the Division that replaced a geographic organization of litigation units with one composed of sections with designated subject matter areas of expertise. In December 1977 the Section was again reorganized and was renamed the Housing and Credit Section to reflect its added responsibilities under ECOA. Separate Housing and Credit subsections were established at that time.

A. Staffing and Budget

As of December 1977 the Housing and Credit Section had 38 employees. They were a Section Chief and 2 deputies, all attorneys; 1 senior trial attorney; 17 staff attorneys; 7 paralegal specialists; and 10 clerical staff members. There was one vacant attorney position.[32] The Section's budget for fiscal year 1977 was $1,332,000. The estimates for fiscal years 1978 and 1979 were $1,385,000 and $1,621,000, respectively.[33]

The small size of the Housing and Credit Section is one of the principal impediments to more effective enforcement of fair housing law in this country. As is discussed in further detail in section III of this chapter, the Housing and Credit Section has brought only a limited number of pattern and practice cases in the 10 years of its existence. The Commission believes that more staff is essential in order for the Department to file enough pattern and practice cases to convince the housing industry that the Department will routinely enforce the law. Unlike the fair employment arena, in which the Equal Employment Opportunity Commission shoulders a large measure of the Title VII enforcement burden along with the Department of Justice, in the fair housing field the Department stands as the sole agency assigned enforcement authority by Title VIII. The limitations created by this fact have been noted by the Supreme Court. Justice Douglas, speaking for a unanimous Court in the *Trafficante* case, stated:

> Most of the fair housing litigation conducted by the Attorney General is handled by the Housing Section of the Civil Rights Division, which has less than two dozen lawyers. Since HUD has no enforcement powers, and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits. . . .[34]

> Inasmuch as Title VIII does not provide for attorneys fees in private actions except upon a showing of economic hardship, and since the act makes no provision for the filing of third party complaints, private litigation to enforce Title VIII is not as prevalent as it might otherwise be. In such circumstances increased litigation by the Section becomes even more important[35]

The view that the Section is too small to fulfill adequately its mission is shared by former Department employees and private fair housing advocacy groups and organizations.[36]

Division, Department of Justice, memorandum to Drew S. Days, III, Assistant Attorney General, Civil Rights Division, Department of Justice, for transmittal to Howard A. Glickstein, Director, Task Force on Civil Rights Reorganization, Jan. 27, 1978, attachment, p. 2 (hereafter cited as Schwelb attachment).

[31] 382 U.S. 409 (1968).

[32] U.S., Department of Justice, General Legal Activities, Salaries and Expenses, 1977.

[33] Frank E. Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, letter to Cynthia N. Graae, Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, Dec. 28, 1977 (hereafter cited as Dec. 28, 1977, Schwelb letter).

[34] Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972).

[35] Both of these shortcomings in Title VIII were addressed by Commission Chairman Arthur S. Fleming in his testimony before the House on H.R. 3504. See, Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Testimony Before the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights, June 7, 1978, pp. 4, 9 (hereafter cited as Flemming statement).

[36] Warren Dennis, former senior attorney, Housing and Credit Section,

The size of the Housing and Credit Section is, of course, a matter of only limited control by the Section or the Department. To illustrate, in spite of the Section's new responsibilities under ECOA, the Office of Management and Budget denied a 1977 request from the Department for an additional five attorneys, two research analysts, and two secretaries. Thereafter, in an attempt to balance its staffing needs, the Civil Rights Division reallocated some of its existing resources, transferring positions for three attorneys, one paralegal specialist, and one secretary from other sections to the Housing and Credit Section.[87] Nevertheless, the end result was a net loss in legal staff to the Housing subsection, since approximately half the legal staff of the Section were assigned to the Credit subsection,[88] which deals not only with mortgage lending, but all types of credit extension covered by ECOA.[89]

The fact remains that the Civil Rights Division has not been forceful in seeking the additional staff that are so sorely needed for fair housing enforcement.[90] In early 1978, in connection with two major fair housing bills, the Assistant Attorney General, Civil Rights Division (hereafter referred to as the Assistant Attorney General), indicated, in an otherwise strong statement supporting increased enforcement powers, that even if the Department received new fair housing-related enforcement responsibilities, in his view, the Division would not need additional staff resources.

Each of the two bills would increase the fair housing role of the Department. Title II of H.R. 3504[91] would grant the Department of Housing and Urban Development administrative enforcement authority with respect both to individual complaints and complaints brought on the Secretary's own initiative. These provisions would almost certainly lead to an increase in litigation responsibilities at the Department of Justice, since the Department of Justice is directed by H.R. 3504 to litigate on HUD's behalf to enforce HUD subpenas,[92] obtain compliance with final HUD administrative orders,[93] and secure prompt preliminary judicial relief where appropriate.[94]

H.R. 7787,[95] the other fair housing bill, would ostensibly grant HUD litigation authority. However, inasmuch as the bill does not amend Section 811(g) of Title VIII, which requires the Department of Justice to conduct all litigation brought by or on behalf of the Secretary of HUD, H.R. 7787 would in effect establish the Department of Justice as the Federal Government's fair housing enforcement agency not only for selected pattern and practice cases, but for individual complaints as well.

Nevertheless, the Assistant Attorney General has stated:

> We do not believe that the litigation which would be filed under these proposals would increase the number of suits brought in federal courts. Conceivably, it could, over time, reduce the number of complaints by increasing the Secretary's credibility and effectiveness in negotiation.[96]

The Assistant Attorney General added:

Civil Rights Division, Department of Justice, and head of its Financial Discrimination Unit, interview, Jan. 12, 1978 (hereafter cited as Dennis interview); Avery Friedman, chief counsel, Housing Advocates, Inc., and adjunct professor of housing, Cleveland State University, telephone interview, Jan. 17, 1978 (hereafter cited as Friedman telephone interview); Betty Hoeber, executive director, the Open Housing Center, interview in New York, N.Y., Dec. 19, 1977; and Ilona Rovner, former Assistant U.S. Attorney, telephone interview, Jan. 17, 1978 (hereafter cited as Rovner interview).

[87] Frank Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, interview, Dec. 13, 1977 (hereafter cited as Dec. 13, 1977, Schwelb interview).

[88] Ibid.

[89] Walter Gorman, Deputy Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, telephone interview, Sept. 20, 1978 (hereafter cited as Sept. 20, 1978, Gorman telephone interview). As of Sept. 20, 1978, the Credit subsection had a staff of eight attorneys, including a Section Deputy. It was anticipated that a ninth attorney position would be filled shortly. Attorneys in the Credit subsection work on both mortgage credit cases and other consumer credit issues. No attorney is assigned to a particular credit area on a permanent basis. Ibid.

[90] An alternative approach suggested by the Section Chief for increasing Federal fair housing resources would be to give selected U.S. Attorneys specific civil rights and fair housing-related responsibilities. This idea offers the potential for having investigative and litigative resources available in the field on a permanent basis. Frank Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, and Joel Selig, Deputy Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, interview, Sept. 7, 1978 (hereafter cited as Schwelb-Selig interview). The Section Chief further noted:

> [M]ajor United States Attorney's offices ought to have civil rights units which affirmatively look for and develop cases in the same way as our Section does. . . . I would only object to a system under which our people would work up cases but someone else would try them, for we could not then retain attorneys. The proposal which I favor would require United States Attorneys to accord civil rights cases high priority, for they would be required to allocate a specific percentage of their budget for civil rights positions. This is, as you know, a general view of mine rather than a firm or specific proposal, and I know of no Civil Rights Division position on it. Schwelb memorandum, p. 5.

[91] Title II of H.R. 3504, commonly known as the Edwards-Drinan bill, was introduced in early 1977. Title I of the bill addresses the issue of improving fair employment enforcement by granting administrative enforcement authority to the Equal Employment Opportunity Commission.

[92] See sec. 810(a)2(d) of the bill.

[93] See sec. 811(b) of the bill.

[94] See sec. 811(d) of the bill.

[95] This bill was introduced by Rep. Gladys Spellman on June 14, 1977.

[96] Days statement, p. 5.

> I can say that I believe we have the organization and the capability in the Department of Justice to handle any court litigation ancillary to administrative proceedings, and the increased attorney strength necessary, while depending on the volume of matter referred, would probably be slight.[37]

The view of the Assistant Attorney General that additional staff resources would not be required even if new enforcement authority were created by the passage of either H.R. 3504 or H.R. 7787 is not consistent with the findings of this Commission. His position appears to be based on the assumption that knowledge of enforcement authority at HUD will, in and of itself, prove sufficient to motivate respondents to come into compliance through conciliation. The Section Chief has stated:

> It is my view and, I think, the Division's, that if HUD is granted enforcement authority, and if that authority is used to sue recalcitrant respondents, such respondents will have a greater incentive to be reasonable than they do under current law.[38]

The Commission's experience, however, leads to a contrary conclusion. We have observed time and again that statutory enforcement authority alone, without the operational capability to make use of such authority, leads to much the same result as no enforcement authority at all. Without regular enforcement activity a sense of security is created among respondents. They conclude that whatever the law may require, the likelihood of being sued is so low that it is not in their interest to make major concessions in order to come into compliance.[39] The Section Chief has observed that, "The Commission may also be assured that, if the amendments are enacted, and if we represent HUD, and if a violator then refuses to conciliate, the likelihood of suit will not be low at all."[40] In spite of this assurance, however, the Commission remains doubtful that increased litigation by the Section will be possible without a concommitant increase in staff.

[37] Ibid.
[38] Schwelb memorandum, p. 5.
[39] See U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel* (1977), p. 197 (hereafter cited as *To Eliminate Employment Discrimination: A Sequel*). Also, see generally the discussion of Federal contract compliance enforcement efforts in U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,* vol. V, *To Eliminate Employment Discrimination* (1975) (hereafter cited as *To Eliminate Employment Discrimination*), and observations on Title VI enforcement efforts in *To Extend Federal Financial Assistance.*

B. Organization

The Section is divided into two subsections, Housing and Credit. Although assignments can vary according to workload, it has been projected that both subsections will be about equally staffed with attorneys.[41] The Credit subsection is responsible for housing cases involving discrimination in financing brought under Title VIII and ECOA, as well as other types of credit discrimination unrelated to fair housing. The Section also has an Enforcement Unit, which is a separate unit established for the sole purpose of monitoring court orders and consent decrees for compliance. It is usually staffed with one to three attorneys working part time in this area, as well as the majority of the Section's paralegal personnel.[42]

Prior to the December 1977 reorganization the Section had two other specialized units. One was the Financial Discrimination Unit, created in 1974 to identify and litigate credit discrimination cases which prior to that time had received inadequate attention from the Section. The other unit was the Sex Discrimination Unit, also created in 1974, in anticipation of the amendment of the Fair Housing Act to cover sex. Both of these units were staffed with two or three lawyers on a full-time basis.[43] As a result of the December 1977 reorganization, these two units have been dissolved and their staff have been assigned to the Housing and Credit subsections.[44]

III. Work of the Housing and Credit Section

A. Objectives

The principal responsibility of the Section since its creation has been to enforce the mandate of the Fair Housing Act for equal housing opportunity.[45] The Section's original aim was to establish a body of Title VIII case law in the Federal courts defining the parameters of the act. The strategy in pursuit of that aim was to bring as many significant cases, covering as wide a range of subject matter, in as

[40] Schwelb memorandum, p. 6.
[41] Frank Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, telephone interview, Aug. 21, 1978 (hereafter cited as Aug. 21, 1978, Schwelb telephone interview).
[42] Michael Barrett, Attorney, Housing and Credit Section, Civil Rights Division, Department of Justice, interview, Jan. 4, 1978 (hereafter cited as Barrett interview).
[43] Schwelb attachment, pp. 6–7.
[44] Aug. 21, 1978, Schwelb telephone interview.
[45] Except as otherwise indicated, the material in section III of this chapter is derived from the Schwelb attachment.

many geographic areas as possible. The Section reports that, during the first several years after Title VIII was enacted, it developed litigation[46] in almost every geographic area and filed and concluded actions against some of the largest real estate firms in major metropolitan areas throughout the United States.

According to the Section Chief, this litigation served to develop a number of legal doctrines of substantial importance. Notable among these doctrines were (1) the existence of a duty on the part of defendants to take affirmative steps to correct the effects of past discrimination[47] and (2) the standing of the United States to sue several defendants operating in the same geographic area as part of a group pattern and practice even where no defendant had individually engaged in a pattern and practice and even though the defendants had not acted in concert.[48] Additionally, the Section established principles for proving a pattern and practice of discrimination without evidence of large numbers of individual incidents of discrimination and for establishing the vicarious liability of principals for the discriminatory acts of their agents.[49]

Moreover, the participation of the Housing and Credit Section in private litigation (where the United States was not actually a party) has been significant in the development of precedents concerning standing, standards of liability under the act, damages, and counsel fees, all of which have made it easier for private litigants to secure the rights afforded them by the act.[50] A primary example of the Section's involvement in private litigation is *Trafficante* v. *Metropolitan Life Insurance Co.*,[51] the first case brought under the act to reach the United States Supreme Court. In this case the Court upheld the standing of incumbent black and white tenants to sue a landlord for discrimination against nonwhite applicants on the ground that the conduct of the landlord interfered with their opportunities for interracial association. This was the position advanced by the Section in its *amicus* brief.

By early 1974, however, the Section leadership had determined that: "the time had come for some revision of our emphases and priorities. The goal of creating a presence in most parts of the country had largely been accomplished."[52] Efforts were then made to address specifically the need for more litigation in areas of housing discrimination previously underemphasized, including discrimination in financing and sex discrimination.[53] These areas of concern were approached in part by the creation of the special units for financing and sex discrimination discussed in part II of this chapter.

B. Targeting and Case Selection

1. General

Complaints may be filed directly with the Department by private citizens or may be referred to the Department by other Federal agencies, State and local agencies, or private civil rights and fair housing groups.[54] Investigations into possible patterns of discrimination are in some cases difficult for the Department to conduct since, prior to the initiation of a court proceeding, the Department lacks subpena power under Title VIII. The Section

[46] Some of the law that the Section has helped create and the cases from which these results emanated include, as described by the Department:

—United States v. Hunter, 459 F.2d 205 (4th Cir. 1972) *cert. denied*, 409 U.S. 934 (1972). In this case the court of appeals held that Title VIII permitted suits not only against persons who place discriminatory advertisements but also against the newspapers that print them. The court also held that because discriminatory advertisements were "pure commercial conduct" rather than an exchange of ideas, prohibition of such activity did not violate the first nor the fifth amendment. Schwelb attachment.

—United States v. American Institute of Real Estate Appraisers (AIREA), et al., P.H.E.O.H. Rptr., para 15,238 (N.D. Ill. 1977). This case, developed by the Section's Financing Unit, helped remedy the practice of discriminatory appraisal standards which lead to racial redlining. Schwelb attachment.

—Laufman v. Oakley Building and Loan Company, 408 F. Supp. 489 (S.D. Ohio 1976). In this case the district court adopted the *amicus* position of the Section when it held that racial redlining by a lending institution violates the Fair Housing Act. It constitutes discrimination in financing based on race as it makes housing unavailable to minorities, and it interferes with the statutory right to equal housing opportunity. Schwelb attachment.

—United States v. Prudential Savings and Loan, C.A. No. C-76-124 (D. Utah) and United States v. Jefferson Mortgage Corporation, C.A. No. 76-0694 (D. N.J.). The settlements obtained by the Section in these cases helped eradicate unlawful sex-based credit criteria not only in the institutions charged, but also throughout the lending industry. The cases were a joint effort of the Finance and Sex Discrimination Units, discussed *supra*. Warren Dennis, former Housing and Credit Section Senior Attorney, Finance Discrimination Unit, telephone interview, Aug. 21, 1978.

[47] United States v. West Peachtree Tenth Corp., 437 F.2d 211 (5th Cir. 1971).

[48] United States v. Bob Lawrence Realty Co., 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973).

[49] United States v. Reddoch, P.H.E.O.H. Rptr. para. 13,569 (S.D. Ala. 1972), *aff'd*, 467 F.2d 897 (5th Cir. 1972).

[50] See, e.g., Fair Housing Council of Bergen County v. East Bergen County Multiple Listing Service, 442 F. Supp. 1071 (D.N.J. 1976); Marr v. Rife, 503 F.2d 735 (6th Cir. 1974); and Parker v. Shonfeld, 409 F. Supp. 876 (N.D. Calif. 1976).

[51] 409 U.S. 205 (1972).

[52] Schwelb attachment, p. 6.

[53] The passage of the Equal Credit Opportunity Act and the Housing and Community Development Act of 1974 were largely responsible for refocusing the Section's objectives since 1974. Schwelb attachment.

[54] Walter Gorman and Charles Bennett, Deputy Section Chiefs, Housing and Credit Section, Civil Rights Division, Department of Justice, interview, Nov. 14, 1977.

Chief has stated that, "our lack of general subpoena power has not been a major problem in housing cases, except in racial redlining and other lending discrimination cases."[55]

To maximize its outreach capability in uncovering possible litigation targets, the Section has relied upon public and private sources of information outside the Federal Government as well as upon other Federal agencies in gathering sufficient evidence to initiate litigation. The Section Chief noted that, "We have tried hard to obtain information from HUD, the Department of Defense, and other agencies, and have consistently urged HUD to be more forthcoming."[56] To facilitate this information gathering process, Section attorneys sometimes travel to regions of the country that are assigned to them geographically on a permanent basis. These trips are specifically designed to enable the Section to conduct exploratory investigations into possible discrimination, by making contact with local public and private fair housing and civil rights agencies, groups, and organizations.[57] Section attorneys also deliver speeches throughout the country explaining the rights protected by fair housing legislation and in the course of this educational effort often uncover evidence of housing discrimination.[58] Unfortunately, these trips are often subject to the exigencies of a limited travel budget, particularly near the end of a fiscal year.[59]

2. *Testing and Data Collection*

It is especially important that the Section, operating as it does with very limited staff and budgetary resources, maximize its investigative efforts where they will be most likely to produce litigation. In some respects, such as with the temporary creation of the Sex and Finance discrimination units cited earlier, the Section has demonstrated good management and sound resource allocation. These efforts increased litigation in the desired areas. However, the Housing and Credit Section has been unable to make adequate use of two investigative tools that are potentially of great value in uncovering systemic housing discrimination. These tools are "testing" and the collection and use of regularly reported data.

"Testing" or "checking" involves the gathering of evidence by placing a majority-group and a minority-group representative, each with identical credentials—such as income, family size, and preferences for housing—in the same posture vis-a-vis a suspect broker, builder, or lender. If the treatment received by the minority-group member differs from that afforded the majority-group member, housing discrimination can often be established.[60]

Although the Department of Justice has made use of evidence gathered by private testing organizations in its litigation[61] and has defended the practice when performed by outside testing groups,[62] it has not yet chosen to utilize its own resources for this investigative technique. In a lengthy and detailed memorandum the Chief of the Housing and Credit Section "argued that this practice is an appropriate and badly needed tool in fair housing enforcement"[63] and does not constitute entrapment.[64]

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[55] Schwelb memorandum, p. 6.

[56] Ibid., p. 7.

[57] Frank Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, interview, Feb. 16, 1978 (hereafter cited as Feb. 16, 1978, Schwelb interview).

[58] Schwelb attachment, p. 6. The Section Chief added:

> I would like to note. . .that we have gone to great pains to inform the public about the meaning of the Act. The Prentice-Hall Equal Housing Opportunity Reporter—a necessity for all fair housing practitioners—contains a detailed analysis of the Act which I personally prepared. P.H.E.O.H. Rptr. p. 2351. My staff and I have lectured with great frequency across the country to all varieties of groups and agencies about the meaning of the Act, the case law under it, and related matters, a point recognized by the Commission staff in its draft. Finally, we see to it that all new decisions are reported in Prentice-Hall, and we have a wide mailing list for our press releases. Schwelb memorandum, pp. 16–17.

[59] Judith Wolf, attorney, Appellate Section, Civil Rights Division, Department of Justice, formerly assigned to the Housing and Credit Section, interview, Jan. 3, 1978 (hereafter cited as J. Wolf interview). Jan. 20, 1978, Schwelb interview.

[60] For example, a black tester and a white tester will each go to a broker and ask to see homes in a particular price range. Both "clients" will indicate the same incomes, family size, and type of house preferred. If the broker shows the white tester homes in predominantly white neighborhoods, while directing the black tester to homes in predominantly black neighborhoods, unlawful racial steering may be attributed to the broker.

[61] See, United States v. Youritan Construction Corp., 370 F. Supp. 643 (N.D. Cal. 1973), *modified on other grounds and aff'd.* 509 F.2d 623 (9th Cir. 1975).

[62] See, Northside Realty Associates v. Chapman, 411 F. Supp. 1195 (N.D. Ga. 1976); United States v. State of Wisconsin, 395 F. Supp. 732 (N.D. Wis. 1973).

[63] Frank E. Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, "Fair Housing Testing—What Should the Department do?" discussion paper, January 1978 (hereafter cited as Schwelb paper).

[64] The Commission has studied the question of testing and has also concluded that it is not entrapment. The Commission found:

> It is clear from the relevant case law that testing is not entrapment. In Lopez v. United States, 373 U.S. 427 (1963) the court held that the conduct of a government informer cannot be entrapment simply because he creates a favorable opportunity for the defendant to violate the law. The court went on to conclude that:
>
> . . .in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is

The Section Chief concluded that there are three alternatives for using testing. The first is to use evidence gathered by private testers, which was the Department's posture as of mid-1978. The second is to actively encourage private testing and to direct such activity toward targets identified by the Section. The third alternative is to use Federal Government resources directly in testing. The memorandum favors the last alternative, noting that the open use and defense of the practice by the Department is preferable to encouraging private testing, since the practice often subjects private organizations to litigation that they do not have the resources to defend.[65] However, notwithstanding the apparently favorable attitude prevailing in the Department since 1973, as of July 1978 the use of testing still had not been authorized as an investigative device to be employed by Federal personnel.[66] The Section Chief responded as follows:

> Testing is a very complicated subject on which reasonable people may differ, and I respect the Commission staff's right to a viewpoint different from my own. The staff's basic criticism appears to be that the Department has not heretofore employed testers to do investigative work on its behalf. I agree that we should do so if possible, and we have devoted some time to making this proposal a reality. Perhaps we should have done it faster and better, as the staff suggests. Nevertheless, I do think that our overall record in this important area is an affirmative one.[67]

The utility of regularly reported statistics in discerning patterns of discrimination has been well demonstrated by the experience of the Equal Employment Opportunity Commission in enforcing Title VII of the Civil Rights Act of 1964.[68] The Housing and Credit Section has itself made use of statistical evidence in proving many of its major cases. However, whereas the Civil Rights Division's Employment Section routinely has access to data in developing its cases,[69] the Housing and Credit Section does not, since Title VIII makes no provision for data collection. Nevertheless, although Department representatives have testified at some length on proposals to amend Title VIII, to date they have made no recommendation to add a data collection provision to the Fair Housing Act.[70] The Section Chief has observed:

> [H]owever, we suggested to HUD several years ago that an appropriate regulation be considered by that agency. In connection with proposed legislation, I suggest that one has to consider both the feasibility of such a proposal and its relative importance as compared with other suggested revisions of present law. In my view, proposals to provide HUD with enforcement power and to authorize the United States to seek compensation for individuals, which [the Attorney General] supported in [his] testimony, are more important than racial data collection. Personally, I believe that a dispassionate study should be made as to whether the information gained by such a requirement would justify the burden to all concerned.[71]

The Commission and the Section continue to differ on the advisability of data collection for identifying housing discrimination. In June 1978 Chairman Arthur Flemming, testifying for the Commission

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not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have the criminal disposition to commit that crime. 373 U.S. 427, 436. Frederick D. Dorsey, Assistant General Counsel, U.S. Commission on Civil Rights, memorandum to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, July 7, 1978.

The position in this memorandum was adopted by the Commission at its meeting on July 31, 1978.

[65] Schwelb paper, pp. 9–15.

[66] The importance of testing is further discussed in chapter 1 of this report.

[67] The Section Chief further noted:

> I believe that the Commission should consider the following:
>
> (a) We have eliminated anti-testing laws or ordinances in the State of Wisconsin and in four cities (Upper Arlington, Ohio; San Antonio, Texas; Milwaukee, Wisconsin; and Madison, Wisconsin). I know of no such laws or ordinances anywhere else.
>
> (b) We have been in the forefront of the litigation involving testing, have encouraged responsible use of the practice in our public statements, and have guided fair housing groups in effective techniques through interviews in their publications and through extensive contacts.
>
> (c) We have encouraged private testing where we have been assured that the testers are aware of the possible consequences.
>
> (d) We have sought assistance from the Department of Defense to provide manpower for testing.
>
> (e) We have worked with HUD in connection with the nationwide HUD-NCDH audit and have initiated investigations of the practices of more than 100 subjects as a result of that audit.
>
> (f) We have placed provisions for testing in a number of our recent consent decrees.
>
> (g) We have supported the standing of residents of municipalities affected by racial steering who have tested the practices of real estate companies to sue them under the Act. See, e.g. the Solicitor General's recent Supreme Court *amicus* brief in *Gladstone Realtors* v. *Village of Bellwood*, No. 77–1943, filed September 8, 1978.
>
> It is not easy to find federal personnel to conduct testing, but, as I have indicated, we are trying. More important, we have investigated the results of hundreds of "tests," and many of our cases have been based upon them. Schwelb memorandum, pp. 8–9.

[68] Title VII permits EEOC to require employers subject to that title to submit data on the numbers of minorities and women in their work forces. 42 U.S.C. § 2000e–8(c) (Supp. V 1975).

[69] The Employment Section, by agreement with EEOC, is provided access to these records on request.

[70] Schwelb-Selig interview.

[71] Schwelb memorandum, p. 9.

before the House Judiciary Committee on H.R. 3504, stated:

> In the course of the Commission's many years of evaluating Federal civil rights investigative efforts we have found time and again that the existence of adequate data is essential if there is to be an effective investigation into the root causes of discriminatory patterns and practices. We therefore urge most strongly that the bill be modified to include authorization enabling HUD to require record-keeping and record retention and reporting by those subject to the Act's prohibitions. HUD should be empowered to establish specific standards and reporting provisions, by regulation, for builders, brokers, sellers, lenders, and others affected by Title VIII.[72]

The Department has, moreover, failed to make sufficient use of such data as is available for targeting fair housing cases. The Home Mortgage Disclosure Act (HMDA), enacted in 1976, requires certain regulated mortgage lending institutions to collect and maintain data on their mortgage loans by census tract. The act specifies that this information is to be made available to the public.[73] HMDA data could be valuable to the Section in targeting lending institutions that appear to be redlining. The Section Chief commented:

> The Section uses HMDA information in focusing its attention on banking problems. However, we have so far relied on studies which analyze HMDA data, and we do not yet have a program for systematically gathering this information. Our reason for not placing greater emphasis on HMDA statistics is that these reports only disclose the locations where loans have been made, but do not identify requests for loans for any particular areas, or for the institution as a whole. I might add that we expended a huge amount of resources investigating the practices of major lenders in the Washington, D.C. area after studies were brought to our attention indicating that very few home loans were made in D.C., especially east of Rock Creek Park. Despite the statistical data, we were unable to develop proof of any violations.[74]

The Section could, however, make greater use of HMDA data for targeting if it used these data in conjunction with other available racial, ethnic, and sex data, such as those required under ECOA.[75] The Federal Reserve Board, which was vested with responsibility for issuing regulations to implement ECOA, did so with the promulgation of "Regulation B."[76] Regulation B requires lenders subject to ECOA to request and maintain data on the race, sex, national origin, age, and marital status of loan applicants.[77] Although the Department has in some instances gained access to Regulation B data in cooperation with the Federal financial regulatory agencies for investigative purposes, and has, on occasion, reviewed HMDA data after investigations had been commenced, it has never utilized either HMDA or Regulation B data for targeting purposes.[78] The Section Chief added the following observations:

> While the staff is correct in stating that HMDA records are available to the public and, therefore, to us, the Regulation B materials are not. In fact our efforts to obtain from agencies specific facts covered by Regulation B have largely been unsuccessful. Each of the agencies asked has permitted us to inspect its examination reports, but these papers usually do not have the detailed documentation needed to determine whether a lawsuit should be brought. Only the Federal Home Loan Bank Board staff has actively assisted us in securing specific facts needed for our investigations, and that agency is the only one which has allowed Justice Department attorneys seeking evidence of violations to accompany its examiners.[79]

3. Areas Inadequately Targeted

A number of types of cases require greater attention by the Housing and Credit Section. Included in this category are cases involving discriminatory zoning, cases in which persons of Hispanic origin are identified as the victimized class,

[72] Flemming statement.
[73] See 12 U.S.C. §§ 2803 and 2808. (1976). For more on HMDA, see chapter 3 of this report.
[74] Schwelb memorandum, p. 10.
[75] The Federal Deposit Insurance Corporation, for example, has indicated its intent to utilize these data in this fashion in its recently published regulations. See the chapter on the Federal financial regulatory agencies for further discussion.
[76] 12 C.F.R. § 202 (1977), as amended by 42 Fed. Reg. 1242–1263 (1977).
[77] 12 C.F.R. § 202.13. See chapter 3 for more detailed discussion of ECOA and Regulation B.
[78] Sept. 20, 1978, Gorman telephone interview. Mr. Gorman expressed the view that seeking access to Regulation B data for targeting might constitute "improper use" of the Department's investigative authority absent information suggesting a violation of law. Ibid.
The Section Chief added:

> At this time the Regulation B data is only available if we have already focused an institution as a "target," and I agree that it is more appropriate to use our limited staff to investigate the activities of those lenders as to whom we have some evidence of ECOA or Fair Housing Act problems. Schwelb memorandum, p. 10.

[79] Schwelb memorandum, pp. 9–10.

cases alleging sex discrimination, and fair housing cases on any basis brought pursuant to ECOA or the Housing and Community Development Act of 1974. In early 1978 the priorities of the Section were delineated as encompassing three major areas: exclusionary zoning, discrimination in the financing of housing, and sex discrimination in both housing and credit.[60] These priorities are a positive step toward improving the Section's targeting.

Through February 1978 the Section had filed suit or intervened on behalf of the plaintiffs in only a small number of cases where exclusionary zoning was at issue.[61] The limited activity in this area has in part been attributed to political restraints placed on the Department during the early years of the Nixon administration.[62] According to the Section Chief, there was considerable controversy during the Nixon administration as to what Federal policy regarding exclusionary zoning cases should be. President Nixon publicly expressed his opposition to forced economic integration of the suburbs.[63] Administration resistance delayed the filing of the *Black Jack* case[64] for almost a year after the Section proposed to file suit.[65] Indeed, the suit was filed only 2 days prior to the testimony of the Attorney General before the U.S. Commission on Civil Rights on the efforts of the Department in enforcing Title VIII.[66] A delay also ensued regarding the Section's proposed suit against the city of Parma, Ohio.[67] The Section Chief noted that other zoning cases developed by the Section were held up due to uncertainties as to administration policy; by the time the constraints imposed by the administration had been removed, some of these cases had become moot. Moreover, the Section's proposals for *amicus* participation in several major lawsuits were rejected by then Solicitor General Bork.[68] These impediments were compounded by the fact that in January 1973, HUD placed a virtual moratorium on federally-supported, low- and moderate-income housing construction programs. The Section Chief noted:

> The HUD "freeze", based as it was on the former Administration's emphatically stated views that the FHA-236 and related programs were failures, also made it virtually impossible for this Department to attack as racially discriminatory a municipality's opposition to projects designed to be built under such programs.[69]

Similar pressures no longer prevent the filing of zoning cases,[70] and there are signs that Section activity in this area is increasing. In mid-1978, the Section was participating as *amicus* in a major zoning case involving HUD. The Section Chief has stated:

> Recently, however, things have changed. Under the new Administration, we filed a brief *amicus curiae* supporting a decision below for plaintiffs in *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *petition for cert pending*, even though HUD had been a defendant in the case. This constituted an important shift in policy. While I cannot be certain, I do not anticipate the kinds of policy restrictions in the new Administration which were imposed by Mr. Bork, and earlier by the White House.[71]

As further evidence of recently increasing activity in this area, the Section Chief supplied the following information:

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[60] Jan. 20, 1978, Schwelb interview.

[61] Frank E. Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, letter to Cynthia N. Graae, Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, Feb. 22, 1978, p. 5 (hereafter cited as Feb. 22, 1978, Schwelb letter).

[62] Ibid.

[63] See Statement by the President on Federal Policies Relative to Equal Housing Opportunity, June 11, 1971.

[64] United States v. City of Black Jack, 308 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). The Department of Justice described Black Jack as follows:

> In this famous case, which made its way to the Nixon-Ehrlichman tapes during the period when the White House delayed its filing for several months, the Court of Appeals held that a St. Louis suburb had violated the Fair Housing Act when it incorporated as a city and revised its zoning laws to exclude further apartment construction. . . .The Court, in a landmark decision, held that discriminatory zoning actions are covered by the Fair Housing Act in that they make housing unavailable because of race and interfere with the exercise of rights protected by the Act. . . .The Court considered the nonracial justifications presented by Black Jack in support of its actions and held that Black Jack had failed to prove that its actions served these asserted justifications. The United States had previously filed an *amicus* brief in *Park View Heights* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1973), in which the Court of Appeals upheld our contention that the separate suit against the City brought by the sponsors and prospective tenants of Park View Heights was justiciable and that the plaintiffs had standing to bring it. Schwelb attachment p. 30.

[65] Feb. 22, 1978, Schwelb letter, p. 6.

[66] *Hearing Before the United States Commission on Civil Rights, Washington, D.C.*, June 14–17, 1971, p. 968.

[67] United States v. City of Parma, 374 F. Supp. 730 (N.D. Ohio 1973). Feb. 22, 1978, Schwelb letter, p. 6.

[68] Feb. 22, 1978, Schwelb letter, pp. 5–7. Most notably, Section participation in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), was denied within the Department.

[69] Schwelb memorandum, p. 11. The "FHA-236" program to which Mr. Schwelb refers is authorized by the National Housing Act, as amended in 1968, Section 236; Pub. L. 90-448; 12 U.S.C. § 1715.

[70] Feb. 22, 1978, Schwelb letter, p. 8.

[71] Ibid.

> On April 18, 1978, the United States sued Sault Ste. Marie, Michigan, in connection with the blocking of a development to be occupied by American Indians. In August, 1978, the virtually all-white Village of Milford, Ohio reversed its prior refusal to allow an integrated development to tie in to its sewer line after our Section, armed with a signed complaint, advised city authorities of our intent to sue. . . .We have also devoted substantial manpower to similar controversies in Raleigh, North Carolina; Greenville, South Carolina; Arlington, Massachusetts; Arvada, Colorado; Dayton, Ohio; St. Bernard, Ohio; Henrico County, Virginia; Waterbury, Connecticut; Dunkirk, New York; and elsewhere. In some of these cases (Raleigh, Dayton, Arlington, Henrico County) our investigation showed no segregative impact; the others remain active and of high priority.[95]

The Section Chief has, however, also stated that:

> these cases do not grow on trees, and it is unrealistic to anticipate dozens of them. Moreover, while we have done very well in court in these cases, they seldom result in the housing actually being built, for developers, put off by the delays which a court fight engenders, tend to change their plans.[96]

Indeed, the protracted and complex nature of zoning litigation makes it extremely difficult for private citizens and private fair housing groups to bring such cases. Yet such suits offer long term potential for opening more of the Nation's communities to integrated low- and moderate-income housing. Thus, there continues to be a great need for the Federal Government, which has the staying power, to prosecute such suits forcefully.

The Section's efforts to identify and litigate cases involving housing discrimination against Hispanics have been largely unsuccessful in spite of efforts by the Section to uncover such cases.[97] In 1970 the Section was reviewed by the Civil Rights Division, and it was suggested that the Section should place greater emphasis on complaints of discrimination against Hispanics.[98] However, few Hispanic complaints were filed with the Section, and thus in 1973 the Civil Rights Division developed a task force, which included an Hispanic attorney from the Housing Section, to focus on locating such complaints.[99] In 1975 a Section attorney spent several weeks on an exploratory investigation in the Southwest, but the few complaints uncovered could not be substantiated.[97]

In addition to these efforts, the Section maintains contact with more than 100 Hispanic civil rights organizations in the country so that these organizations will refer complaints of discrimination to the Section.[98] One of these organizations, the Mexican American Legal Defense and Educational Fund, has referred some complaints to the Section, but Title VIII violations could not be substantiated.[99] The net result of all of these efforts has been that the Section has only filed about a dozen cases which have charged housing discrimination against Hispanics or which have even benefited Hispanics indirectly by including them in the class of persons for which relief was obtained.[100]

In the view of the Section Chief, an explanation for the low number of Hispanic complaints may be that the Hispanic community focuses more on issues related to the criminal justice system than on housing.[101] It is his impression that Hispanic civil rights groups are not as organized to identify and eliminate housing discrimination as are black and female civil rights groups. He speculates that individual group members thus may receive less counsel and direction for filing housing discrimination complaints.

It should be noted that in the course of its 10-year history the Section has attempted to represent all minority groups. As the Section Chief notes, cases have been brought to:

> contest discrimination against other non-black minorities, including Jews, Asians, American Indians, Iranians, Pakistanis, South Americans, and others. . . .Important recent developments

[95] Schwelb memorandum, pp. 11, 12.
[96] Feb. 22, 1978, Schwelb letter, p. 8.
[97] Notwithstanding the relative dearth of complaints of housing discrimination from persons of Hispanic origin, a number of studies by this Commission indicate that this minority group does face serious housing problems. See U.S., Commission on Civil Rights, *Twenty Years After Brown* (1977), pp. 159–61; see also, U.S., Commission on Civil Rights, *Social Indicators of Equality For Minorities and Women* (1978), pp. 67–85.
[98] Dec. 13, 1977, Schwelb interview.
[99] J. Wolf interview.
[97] Martin Barenblat, former Housing and Credit Section attorney, Civil Rights Division, Department of Justice, telephone interview, Dec. 15, 1977.
[98] Barrett interview, Jan. 4, 1978.
[99] Dec. 13, 1977, Schwelb interview.
[100] Two of the cases referred to discrimination against Puerto Ricans by New York landlords controlling tens of thousands of apartment units. Schwelb attachment, pp. 13–14.
[101] Frank E. Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, telephone interview, Sept. 12, 1978. It should be noted that the Section Chief emphasized that these views were essentially subjective impressions, derived from his own observations in 10 years as Section Chief and from personal contacts with colleagues, friends in the Hispanic community, and Hispanic organizations.

> involving non-black minorities which have occurred since the Commission staff approached us include *United States* v. *Apartment Computerized Finders, Inc.*, C.A. No. 78-0222-D, (W.D. Okla. 1978) (discrimination against Arabs and Iranians. . .and an important investigation in Colorado which presents an interesting application of *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) to discrimination against aliens, including Iranians, Arabs, and Latin-Americans.[102]

As of early 1978 the Housing and Credit Section had not initiated any cases pursuant to the Housing and Community Development Act of 1974.[103] Similarly, although the Section had brought mortgage credit litigation pursuant to Title VIII,[104] it was not until 1978 that it filed any housing finance discrimination cases pursuant to ECOA. The Section Chief informed the Commission:

> We have so far brought three additional suits involving alleged discrimination in credit during 1978 (two of them involved residential loans), and will probably file a fourth this week (with a consent decree), and a fifth within a few weeks. A sixth, based on a referral from FTC, is expected in the very near future. We are also heavily into insurance redlining problems.[105]

It appears that litigation by the Section could be increased under both of these statutes if coordination efforts between the Department of Justice, on the one hand, and HUD[106] and the Federal financial regulatory agencies, on the other, were improved, particularly with respect to the referral of cases.

It should be noted, however, that the Section is not dependent on referrals from these agencies in order to litigate under these two statutes. Each law provides the Attorney General with independent litigation authority in pattern and practice cases.[107]

With regard to the issue of interagency coordination, the Section Chief stated:

> It remains true today that our Section has not brought any cases under the Housing and Community Development Act of 1974. The fact is, however, that we have made efforts through discussions with HUD officials to secure HUD referrals of such cases but have been advised that HUD prefers to proceed administratively.[108]

The Section has, however, made significant efforts in recent years to assist the four Federal financial regulatory agencies in understanding and discovering mortgage discrimination in their examination of regulated institutions. The Section Chief observed:

> [A Deputy Section Chief]. . .and others devoted a great deal of time and effort to training and sensitizing employees of the financial regulatory agencies to civil rights problems, with the result that prior to 1976, examiners from the Federal Home Loan Bank Board (FHLBB) had noted no discrepancies suggesting civil rights law violations during their regular examinations of Savings and Loan Associations. From January 1, 1976 to March 31, 1977, following the commencement of the training sessions and interagency activities, FHLBB noted 581 discrimination-connected irregularities.[109]

The Section has unquestionably moved with reasonable speed in bringing cases involving sex bias[110] since the creation of a special unit for this purpose in 1974.[111] There is, however, some opinion from former Section staff that, particularly in the

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[102] Schwelb memorandum, p. 12. Among the earlier cases identified by the Section involving other minority groups are:

> United States v. Tilden Gardens, Inc. (D.D.C.) (cooperative apartment allegedly excluded Jews)
> United States v. Palm Beach Listing Service (S.D. Fla.) (multiple listing service allegedly excluded Jews)
> United States v. Household Finance Corp. P.H.E.O.H. Rptr. para. 18,001 (N.D. Ill. 1972) (lending discrimination against American Indians; relief for them and for Hispanics)
> United States v. Barrows & Wallace (D. Conn.) (multidefendant suit involved Puerto Ricans as well as blacks)
> United States v. Colony Developers, Inc. (E.D. Va.) (discrimination against Asians on account of "appearance"; monetary relief)
> United States v. Ditmar (discrimination against various nationalities, including Iranians and Paraguayans)
> United States v. Westside Building Co., 382 F. Supp. 148 (C.D. Calif. 1975) (original discrimination against Japanese American). Schwelb attachment, p. 14.

[103] Housing and Community Development Act of 1974, Pub. L. 93-383, Aug. 22, 1974, 88 Stat. 633 (codified in scattered sections of 42 U.S.C.).

[104] See the discussion of these cases earlier in this chapter.

[105] Schwelb memorandum, p. 14. The Section Chief identified the following cases as being among more recent Section activity in the mortgage credit area: Franklin-Quincy Corp. v. Public Service Mutual Ins. Co., C.A. No. 76C-1543 (E.D. N.Y. 1976); United States v. Sumer Advertising Agency, et al., C.A. No. SA-78—CA-199; United States v. Western Resort Properties, et al., C.A. No. 3-78-0456-G; and United States v. Citizens Mortgage Co., C.A. No. 78-699-A (E.D. Va.).

[106] Schwelb attachment, p. 2.

[107] 15 U.S.C. § 1691e(h) (1976) and 42 U.S.C. § 5039(c) (Supp. V 1975).

[108] Schwelb memorandum, p. 13.

[109] Ibid., pp. 14, 15. The Section Chief added:

> Senator William Proxmire, Chairman of the Senate Banking Committee, has repeatedly expressed his appreciation to our Division for its work in the field, which he has contrasted with what he has believed to be foot-dragging by other federal agencies. Feb. 22, 1978, Schwelb letter, p. 13.

Coordination is discussed in detail in the chapter in this report on interagency coordination.

[110] The Section has, according to the Section Chief, brought in excess of 25 cases involving allegations of sex discrimination in recent years. Aug. 21, 1978, Schwelb telephone interview.

[111] See discussion of this unit in section II of this chapter.

early years after the Section obtained sex jurisdiction, the Section and Department leadership was not as sensitive to what constituted sex discrimination as it was to other types of discrimination,[112] and sometimes required a stronger evidentiary base for initiating sex cases than was true for cases involving other protected classes.[113] The Section Chief stated:

> It is also significant that our 25 or so sex discrimination cases since 1974 constitute a far larger percentage of our docket than is true of the docket of any organization of which I am aware. As a matter of fact, I know of only one reported private case of sex discrimination in housing: *Morehead* v. *Lewis*, 432 F. Supp. 674 (N.D. Ill. 1977). Finally, on the question of sensitivity to this issue, I think it worth noting that about half of our attorneys are women.[114]

A review of the cases filed by the Section reveals that a substantial number of its fair housing cases continue to challenge basic rental policies. The Section Chief has explained this pattern on the ground that most of the fair housing complaints received by the Section involve apartments. The reason advanced for the predominance of these complaints is that single-family homes are expensive and many members of minority groups are unable to afford them.[115] The Section Chief has stated:

> Many more blacks, Hispanics and others also apply for apartments, than, say, for home loans or for membership in a multiple listing service. Since we can only sue where we have evidence, and since so much of our evidence involves apartments, we bring a lot of rental cases. In this respect, we are meeting the needs of many victims of discrimination, which is one of our principal functions.[116]

However, it is entirely possible that one reason so many minority and female-headed households live in rental apartments is discrimination in mortgage finance practices, or even the perception of minorities and women, based on past experience, that it is fruitless to apply for mortgage credit, since in all likelihood it will be denied to them.[117] It is also possible that the dearth of discrimination complaints in such areas as mortgage finance and the sale of housing results from lack of awareness by the victims of these practices that their rights are being violated or their belief that there is no way to prove the suspected discrimination.[118]

C. Results

The quality of the work performed by the Housing and Credit Section has generally been praised. The Section has consistently been thorough and comprehensive in conducting its presuit investigations and legal research. It has been equally professional in its actual litigation and settlement efforts. The substantive results obtained by the Section reflect the high quality of the work done.[119]

The Housing and Credit Section (and its predecessor, the Housing Section) has been actively pursuing housing discrimination cases for nearly 10 years, since its creation in 1969. As of mid-1978, the Section had initiated, intervened, or filed as *amicus* over 300 lawsuits involving in excess of 800 defendants. Of this total, many have been resolved by means of consent decrees.[120]

The quality of the relief obtained by the Section through consent decrees has generally been high. The Section Chief stated:

> One important remedy. . .for which we have battled vigorously, is the securing of monetary relief for individual victims of discrimination. In *United States* v. *Fogelman*, P.H.E.O.H. Rptr. para. 18,008 (W.D. Tenn. 1976), for example, we secured offers of more than $150,000 in free rent for more than 300 victims of discrimination.[121]

[112] Donna Goldstein, attorney, U.S. Attorney's Office, Los Angeles, Calif., former Housing and Credit Section attorney, telephone interview, Dec. 16, 1977. Ms. Goldstein emphasized that she believed that the Section leadership worked very hard and with an open attitude to overcome these problems, adding that, in her view, the Section has since become a leader in dealing with sex-based housing discrimination.

[113] Jan. 12, 1978, Dennis interview.

[114] Schwelb memorandum, p. 15.

[115] Feb. 22, 1978, Schwelb letter, pp. 2, 3.

[116] Ibid.

[117] A parallel might be drawn with the employment field, where knowledge of past discrimination has been presumed by Federal courts to be the reason that minorities failed to apply for employment with a defendant. See, for example, Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969); Cypress v. Newport News General and Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967).

[118] The Section Chief stated:

> One may speculate about anything, but it is a matter of common knowledge that single family homes are now prohibitively expensive for a large part of the population, especially for the poor and for the substantial number of blacks, Hispanics and others embraced in that economic class. Anyone familiar with the housing market knows that the greatest demand among minorities is for rental housing. I stress, however, that this does not negate our duty to look for cases of financial discrimination. That is why I assigned some of my best attorneys to do so, a move praised by the Commission staff. Schwelb memorandum, pp. 15–16.

[119] Martin Sloane, General Counsel, National Committee Against Discrimination in Housing, interview, Jan. 13, 1978 (hereafter cited as Sloane interview); Friedman telephone interview; Rovner interview.

[120] Schwelb letters, Dec. 28, 1977, p. 2, and Feb. 22, 1978, p. 1.

[121] Schwelb memorandum, p. 16.

These decrees generally prohibit any future unlawful discriminatory actions and also require affirmative steps to correct the effects of past discrimination.[122] For example, some of them require that waiting lists be composed on a "first come, first served" basis, to ensure that the defendant does not exclude applicants on the basis of race, color, sex, religion, or national origin. Some have required the defendant to advise applicants in writing within 15 days after receipt of a completed application whether they are eligible for housing and, if so, the size of the unit for which they are eligible and their approximate place on the waiting list. If applicants are not eligible for housing, information must be given in writing of the criteria they failed to meet.

Another affirmative remedy in consent decrees requires all new applicants to be offered first choice of all appropriately sized units available in the project locations in which their race does not predominate. If the only available unit is in another project, the applicant may refuse the unit and wait until an appropriately sized unit becomes available in a project in which her or his race does not predominate.[123]

Another consent decree clause requires that each defendant give notice of a nondiscriminatory housing policy to the public generally and all lessors, lessees, and prospective lessors and lessees specifically. The defendant must: (1) display in each office where housing is offered for sale or rent a fair housing sign in the form, size, and prominence required by HUD regulations;[124] (2) notify each referral service or apartment locating service, with which the defendant has had more than three transactions in the preceding 12 months, of his nondiscriminatory policy; (3) include in all of the defendant's realty listing contracts a statement, of conspicuous size, that all properties shown for rental or sale will be made available to all persons without regard to race, color, religion, sex, or national origin; and (4) place in all rental applications, promotional writings, telephone listings, and newspaper and magazine advertisements a prominent display of the "Equal Housing Opportunity" logotype and slogan.

The Section's use of consent decrees does offer considerable flexibility in creating remedies. In some cases more relief can be negotiated through consent decrees than by litigation. A defendant can avoid the time and expense incurred by protracted litigation and can also avoid an adverse judgment that could lead to bad publicity and serve as a basis for a private lawsuit.[125]

The total amount of litigation in which the Section has participated is somewhat disappointing from the standpoint of seeking a more aggressive fair housing enforcement effort nationwide. Even including those cases resolved by consent decree, the Section has only averaged approximately 32 cases per year. The Section Chief commented:

> While I have no precise count, I believe that we have sued about 800–850 defendants, often many in the same suit. These include cases against large defendants who control tens of thousands of units or other transactions. We have sued one or more of the largest real estate companies in many, if not most, of the major metropolitan areas of the country. We have taken on a State and more than fifteen municipalities and public housing authorities. In the "Appraiser" case, we have taken on four large nationwide organizations.
>
> I know of no other Section in this Division, or of any other entity anywhere, that has brought so many cases, many of them very significant, involving patterns and practices of discrimination. Who else has sued more than 800 defendants? It is frankly disillusioning to have such a record, based on very aggressive outreach, summarily dismissed as "disappointing" without any frame of reference being provided or any constructive comparison being offered.[126]

The Commission recognizes, and believes that this chapter accurately reflects, the significant contributions which the Section has made to fair housing. We are aware that the more than 300 cases in which the Section has participated is not an inconsiderable number. Nevertheless, we continue to believe that more intensive litigation is needed to overcome continuing widespread housing discrimination in this

[122] Feb. 22, 1978, Schwelb letter, p. 2.
Ten consent decrees were selected at random from the Department of Justice files and examined by Commission staff.

[123] Decrees provide that an applicant who chooses to wait until an appropriately sized unit becomes available in a location in which her or his race does not predominate will not lose her or his place or priority on the waiting list by doing so. However, if an applicant is offered a unit in a project location in which her or his race does not predominate and she or he declines the offer for reasons other than for good cause, she or he shall lose her or his place on, and be placed at the end of, the waiting list.

[124] 24 C.F.R. § 110 (1975).

[125] It is the view of the Section Chief that this is true in most cases. Feb. 16, 1978, Schwelb interview.

[126] Schwelb memorandum, p. 18.

country. The extent of that discrimination has recently been documented as a result of a national survey jointly sponsored by the Department of Housing and Urban Development and the National Committee Against Discrimination in Housing.[127] Commenting on the results of the survey, HUD Secretary Patricia Harris noted:

> Our national survey confirmed the appalling fact that black people still encounter unconscionable racial discrimination. . . .There is clear probability that discrimination is even more prevalent, especially in view of the fact that the forms it takes have become more extensive and more sophisticated in recent years.[128]

Certainly the small size of the Section is a major contributing factor to the Section's caseload. However, size alone cannot explain the rate of case activity. The overly strict internal standards that the Section maintains for filing a suit, and the numerous levels of review through which a case file must pass before it is deemed litigable by the Department also are likely contributing factors.

The standard used within the Section to evaluate a proposed case is "whether a fairminded court could reasonably be expected to rule in favor of the United States on the basis of available evidence."[129] As the Section is sometimes involved in precedent-setting litigation, the Chief believes that it is imperative to weed out the weaker cases in an attempt to avoid developing a body of adverse case law that would burden future private and government lawyers.[130]

The application of this strict internal standard, however, is necessarily a two-edged sword. The standard probably has contributed to the strong professional reputation of the Housing Section, since it has led to an impressive success ratio in the courts.[131] It has also enhanced the Section's ability to negotiate conciliations when suits are filed. Nevertheless, some concern has been expressed that overly restrictive internal standards unjustifiably limit the number and type of cases in which the Housing Section can participate.[132]

It seems likely that the Section could ease its standards somewhat without jeopardizing its excellent record in the courts. It would then be more likely to be further in the vanguard in developing important precedents in areas such as redlining, sex discrimination, and exclusionary zoning. The importance of developing such precedents is emphasized by the fact that the resources to conduct investigations and formal discovery available to the Department are often unavailable to private litigants.[133] The Section Chief stated:

> Turning to the difficulty supposedly occasioned by our "too strict" standards, the Commission staff has been made aware in a number of our submissions that we have been in the vanguard in all three areas mentioned. See, e.g., *United States* v. *Black Jack,* 508 F.2d 1179 (8th Cir. 1974), *cert. den.* 422 U.S. 1042 (1975) (exclusionary zoning); *United States* v. *AIREA,* 442 F. Supp. 1022 (N.D. Ill. 1978) and *Laufman* v. *Oakly,* 408 F. Supp. 489 (S.D. Ohio 1976) (successful *amicus* brief) (redlining); *United States* v. *Builders Institute of Westchester and Putnam Counties,* No. 76–CIV–4228 (S.D. N.Y. 1976) and *United States* v. *Reece,* P.H.E.O.H. Rptr. para. 15,260 (D. Mont. 1978).[134] In my opinion, if we used looser standards, we would risk being in the vanguard of developing losing precedents, which we are fortunate enough to have been largely able to avoid to date.[135]

Similarly, the multiple levels of scrutiny to which potential cases are subjected before they can be filed

[127] This survey is discussed in greater detail in National Committee Against Discrimination in Housing, *Trends,* Fall Issue 1977, vol. 21, no. 3, and May Issue 1978, vol. 21, no. 5.

[128] Patricia R. Harris, Secretary of Housing and Urban Development, remarks before the National Committee Against Discrimination in Housing, Apr. 17, 1978.

[129] Jan. 20, 1978, Schwelb interview.

[130] Ibid.

[131] The Section indicates that it has lost only two cases on the merits since its creation in 1969. In a third case, won on the substantive issues, the Federal court of appeals reversed that portion of a district court opinion permitting the Department to seek and recover monetary damages for a victimized class. United States v. Long, 537 F.2d 1151 (4th Cir. 1976), *cert. denied,* 429 U.S. 871 (1976), *rev'g* P.H.E.O.H. Rptr. para. 13,637 (D.S.C. 1974). The *Long* decision has recently been followed by the Fifth Circuit in United States v. Mitchell, — F.2d — (5th Cir. 1978). Prior to the *Long* decision the Department had been successful in recovering monetary damages in all district court cases where it had sought this relief (see, e.g., United States v. West Suburban Board of Realtors, P.H.E.O.H. Rptr. para. 13,641 (N.D. Ill. 1974)). Schwelb attachment, p. 25.

[132] Arthur A. Wolf, former Housing and Credit Section attorney, telephone interview, Feb. 14, 1978 (hereafter cited as A. Wolf interview), and Joseph Tafelski, General Counsel, Fair Housing Center of Toledo, Ohio, telephone interview, Jan. 17, 1978.

[133] A. Wolf interview, Friedman telephone interview, and Sloane interview.

[134] The Section Chief stated:

> This recent case held for the first time that refusal to consider alimony and child support payments in determining eligibility to rent constitutes sex discrimination under the Act. Schwelb memorandum, p. 20.

[135] Ibid., pp. 20, 21.

may reduce the capacity of the Department to litigate.[136] In some instances the time process attendant to such internal review[137] ages cases considerably, making them more difficult to present or even moot. The justification process often can and has taken "an inordinate length of time."[138] There is evidence, however, that the speed of this review process is improving. The Section Chief noted:

> While we have had isolated cases of long delays in approval of our cases at higher levels, most of them are long in the past. A major contribution towards expedited review under the current administration has been the Attorney General's authorization to [the Assistant Attorney General] to sign complaints on his behalf. As you know, I am strongly in favor of such delegation of authority and perhaps more of it.[139]

D. Monitoring

From 1969 to 1973, 11 enforcement proceedings were initiated by the Section. Since the creation of the Enforcement Unit in 1974, 25 motions for civil contempt and/or supplemental relief have been filed. But for a few pending cases, all have been successfully concluded through litigation or further negotiation.[140] Three of their more significant cases, as described by the Department, include:

— *United States* v. *West Suburban Board of Realtors,* [141] a civil contempt case which provided relief for victims of racial steering;

— *Ellis and United States* v. *Zicka,* [142] a contempt citation against one of the major rental companies in Cincinnati which included counsel fees for the Government; and

— *United States* v. *Northside Realty Associates,* [143] a civil contempt case which resulted in a conditional order of imprisonment and fines against the largest realtor and two of its officers in Georgia. In addition, an affirmative program was ordered and the defendants were required to pay the costs and counsel fees of the Government.[144]

The capacity of the Department to ensure that the relief which it obtains, either in court or through consent decrees, is actually forthcoming has been considerably improved by the creation of this Unit. Where appropriate, it is a device to be recommended to other sections of the Civil Rights Division.[145]

IV. Internal Coordination

A. The Civil Division

The Civil Division of the Department of Justice is generally charged with the responsibility of defending Federal agencies and Federal officers in actions seeking civil damages. The Government, through the Civil Division, has taken positions in suits inconsistent with those taken by the Housing and Credit Section in the same or similar actions.[146] This dichotomy continues in spite of the fact that existing Department of Justice regulations appear clearly to direct the Civil Rights Division, rather than the Civil Division, to defend Government officials in cases involving civil rights issues.[147]

Perhaps the most glaring example of this internal lack of consistency is the *Gautreaux* case.[148] In this case the Civil Division defended the Department of Housing and Urban Development (HUD) against charges that it had failed to fulfill its responsibility to ensure that public housing supported with HUD funds was built throughout a metropolitan area on a nonsegregated basis. The Section Chief observed:

> The problem in *Gautreaux* was that Solicitor General Bork adopted a position contrary to the one favored by our Division. We were consulted but overruled.

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[136] Sloane interview.

[137] Dec. 13, 1977, and Jan. 20, 1978, Schwelb interviews. If a prospective case receives approval from the Section Chief, it then is sent to the Assistant Attorney General for review. After receiving his approval, simple cases, involving, for example, discrimination in the rental of apartments or trailers, are forwarded to the Attorney General for information. More complex or more controversial cases involving issues such as zoning are forwarded to the Attorney General for his approval.

[138] Sloane interview. The Section Chief responded:

> The draft cites Martin Sloane for the proposition that cases sometimes take a year. I contacted [Mr. Sloane] and he has no recollection of saying this, and knows of no case in which it occurred. He recalls referring to political inhibitions on the *Black Jack* case. We had a lengthy delay several years ago over a case with which a former Deputy Assistant Attorney General did not agree, but it is misleading to suggest that long delays are typical. Schwelb memorandum, p. 21.

Commission staff contacted Mr. Sloane again on October 13, 1978, to verify the accuracy of its attribution. Mr. Sloane confirmed his earlier expressed view that lengthy delays are not atypical within the Department of Justice. In the course of this telephone interview, he stated his view that these delays are occasioned both by internal review processes and political considerations.

[139] Ibid.

[140] Schwelb attachment, p. 12.

[141] P.H.E.O.H. Rptr., para. 13,641 (N.D. Ill. 1974).

[142] P.H.E.O.H. Rptr., paras. 13,759–13,761 (S.D. Ohio 1976).

[143] P.H.E.O.H. Rptr., para. 15, 232 (N.D. Ga. 1977).

[144] No actual imprisonment occurred since the defendants thereafter purged themselves of contempt. Schwelb memorandum, p. 22.

[145] See, for example, the discussion of the monitoring efforts of the Employment Section in *To Eliminate Employment Discrimination: A Sequel,* pp. 280–81.

[146] A. Wolf interview.

[147] 28 C.F.R. § 0.50(g) (1977).

[148] Hills v. Gautreaux, 425 U.S. 284 (1976).

> Thanks to [Assistant Attorney General Days'] arrangement with Assistant Attorney General Barbara Babcock, there is now excellent coordination with the Civil Division, and we are consulted on every case involving equal housing opportunity.[149]

Consultation alone, however, may not ensure that the Department takes the appropriate position in future fair housing cases. As the Section Chief notes, the Civil Rights Division was consulted and then overruled in *Gautreaux*. Moreover, the new arrangement does nothing to address the fact that the Department is ignoring its own regulations when the Civil Division defends the Government in fair housing cases.

With regard to the case itself, the Section Chief has stated:

> Solicitor General Bork, over the vehement opposition of our Division, approved HUD's recommendation to take the *Gautreaux* case to the Supreme Court. The Government's brief in the case contained arguments which [we] found unfortunate as well as unpersuasive. The Supreme Court also found them unpersuasive, and unanimously upheld the decision below, which directed HUD to devise a metropolitan plan to correct discrimination in housing in the City of Chicago. *Hills* v. *Gautreaux*, 425 U.S. 284 (1976). The position taken by the United States in *Gautreaux* was highly publicized and was not helpful in persuading people that we were truly interested in promoting equal opportunity. It is my firm expectation that the United States will henceforth speak more progressively and forthrightly for fair housing than it did in *Gautreaux*. I hope that signs of that will become evident as we develop or participate in more exclusionary zoning cases.[150]

Whether or not the Government will "henceforth speak more. . .forthrightly for fair housing," however, is subject to some uncertainty. For example, in *National Urban League* v. *Comptroller of the Currency*, [151] an action was filed by fair housing organizations against the four Federal financial regulatory agencies. The purpose of the suit was to force the agencies to adopt procedures and practices that the Housing and Credit Section had previously recommended to the agencies to help them take a more aggressive role in carrying out their equal opportunity responsibilities. All but the Federal Reserve Board settled. However, the Civil Division defended the Federal Reserve Board against this civil rights suit.[152]

It would appear that, at a minimum, what is needed to rectify internal differences between the Civil Division and the Civil Rights Division is a clear statement from the Attorney General establishing department-wide policy in relation to fair housing. In August 1977 the Attorney General issued such a memorandum in order to resolve outstanding differences between the Civil Division and the Civil Rights Division regarding fair employment law.[153]

B. The Appellate Section

The Appellate Section of the Civil Rights Division is responsible for appellate litigation involving any section within the Civil Rights Division. Usually the Appellate Section handles all cases in which the Government has not been successful on the merits at the trial level and the Government appeals the decision. When the Government has won a decision at the lower court level and the defendant appeals,

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[149] Schwelb memorandum, p. 22.

[150] Feb. 22, 1978, Schwelb letter, p. 9. This Commission also strongly opposed the position taken by the Government in Gautreaux. In January 1975 the Commission wrote to Solicitor General Bork expressing disappointment with the Department's decision to appeal the lower court's decision in the case. The Commission stated:

> We believe that an appeal in this case would be inconsistent with the need for [metropolitan desegregation]. The Government's response to the Court's decision in this case will make clear to the Nation its policy on metropolitan desegregation. If the Government endorses the Court's decision it will encourage metropolitanwide solutions to residential segregation problems throughout the country. John A. Buggs, Staff Director, U.S. Commission on Civil Rights, letter to Robert H. Bork, Solicitor General, Department of Justice, Jan. 20, 1975, p. 3.

[151] C.A. No. 76-718 (D.D.C.).

[152] A. Wolf interview. The suit against the Board was dismissed in May 1978 on procedural grounds. For a more detailed discussion of this case, see the chapter of this report on the Federal financial regulatory agencies. The Section Chief stated:

> Judge Gesell dismissed that action as against the Federal Reserve Board on the basis of lack of standing. I believe that the Civil Division's assertion of that defense was entirely appropriate and not inconsistent with our policies, although I would have preferred to see the Board settle the case. Schwelb memorandum, p. 22.

[153] Griffin B. Bell, United States Attorney General, memorandum to United States Attorneys and Agency General Counsels, Re: Title VII Litigation, Aug. 31, 1977. The memorandum stated, in part:

> The policy set forth above does not reflect, and should not be interpreted as reflecting, any unwillingness on the part of the department to vigorously defend, on the merits, claims of discrimination against Federal agencies where appropriate. It reflects only a concern that enforcement of the equal opportunity laws. . .be uniform and consistent. . .the Department of Justice is now undertaking a review of the consistency of other legal position advanced by the Civil Division in defending Title VII cases with those advocated by the Civil Rights Division in prosecuting Title VII cases. The objective of this review is to ensure that, insofar as possible, they will be consistent, irrespective of the Department's role as either plaintiff or defendant under Title VII.

often the Housing Section will continue to handle the case.[154] The Section Chief has, however, described the relationship between the two Sections as follows:

> The understanding between the Appellate and Housing and Credit Section is basically that the former Section presumptively handles housing and credit appeals, but that our Section handles some reasonable proportion of them by agreement between [the Appellate Section Chief] and me.[155]

C. Federal Programs Section

The Federal Programs Section in the Civil Rights Division is responsible for litigation under Title VI of the Civil Rights Act of 1964, which prohibits discrimination in all programs that receive Federal assistance.[156] Although there has been information exchanged between the Housing and Credit and Federal Programs Sections, neither Section has made a formal referral to the other.[157]

D. Office of Indian Rights

The Office of Indian Rights of the Civil Rights Division is responsible for all litigation involving violations of the civil rights of Native Americans. In April 1978, after consultation with the Housing and Credit Section, the Office of Indian Rights filed a suit against Sault Ste. Marie, Michigan, alleging that municipal officers were blocking development of proposed housing for American Indians.[158]

[154] Robert Cook, Attorney, Housing and Credit Section, Civil Rights Division, Department of Justice, interview, Jan. 18, 1978.
[155] Schwelb memorandum, p. 23.
[156] Dec. 28, 1977, Schwelb letter, p. 8.
[157] Ibid.
[158] Schwelb memorandum, p. 23.

Chapter 3

THE FEDERAL FINANCIAL REGULATORY AGENCIES

Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Office of the Comptroller of the Currency
Federal Home Loan Bank Board

Summary

Since 1974 the civil rights responsibilities of the four Federal financial regulatory agencies have increased significantly. In addition to Title VIII of the Civil Rights Act of 1968, the four agencies are now charged with duties pursuant to the Equal Credit Opportunity Act (ECOA), the Home Mortgage Disclosure Act (HMDA), and the Community Reinvestment Act of 1977.

As a result of these new statutory requirements, intensive congressional scrutiny, private litigation, and their own independent efforts, the agencies' fair housing posture has improved. In particular, each of the agencies has either issued or proposed rules, regulations, and/or guidelines clarifying the fair housing duties of the lenders they regulate. One of the most significant provisions of this body of regulations is the requirement that regulated institutions collect and maintain data on race, ethnicity, sex, marital status, and age on mortgage application forms.

Each agency has set up a separate unit or division to carry out its fair housing responsibilities. Moreover, each agency has established a fair housing component in its bank examination process. Each of the agencies has also improved its fair housing training of examiners and other staff and has provided written internal guidance for evaluating compliance with fair housing laws.

Since the adoption of improved examination procedures, the Federal Home Loan Bank Board (FHLBB), the Board of Governors of the Federal Reserve System (FRB), and the Federal Deposit Insurance Corporation (FDIC) have detected numerous violations by their regulatees of fair housing requirements. The Office of the Comptroller of the currency (COC), in contrast, although it regulates over 4,500 national banks, has discovered possible violations at only three institutions.

The numerical data provided to this Commission on the types of violations the agencies have uncovered in their examinations reveal only a very limited range of fair housing violations. These violations were generally technical rather than substantive, and included, for example, failure to display the equal housing lender poster, give the

required notice of nondiscrimination in advertisements, or collect the racial, ethnic, sex, marital status, and age data required for compliance with the Equal Credit Opportunity Act. In most cases in which violations have been detected, the agencies have insufficiently monitored promised corrective action.

None of the Federal financial regulatory agencies has demonstrated sufficient use of ECOA data or of the census tract data required by HMDA. These data are essential for detecting patterns or practices of discrimination by mortgage lenders. Until the financial regulatory agencies make proper use of the data, their ability to uncover substantial fair housing violations will not measurably improve.

COC, FDIC, and FHLBB have received a considerable number of fair housing complaints since 1974. FRB has reported only two such complaints. As of May 1978, Federal financial regulatory agency investigation of these complaints had resulted in no corrective action; as of that time, none of the agencies had ever determined that a complaint was valid. This Commission's review of a sample of complaint files indicated that the absence of such a finding, however, may be the result of inadequate complaint investigations and failure to properly characterize as violations the problems uncovered in those investigations.

As of May 1978, none of the agencies had ever initiated formal enforcement action, such as administrative proceedings against a regulatee or referral to the Department of Justice. They have, however, allowed fair housing violations to remain uncorrected. For example, the fair housing examination reports submitted to this Commission by one of the agencies indicated that, in the one case in which the same violations were noted in three consecutive annual examinations, the agency was unable to obtain voluntary compliance. Furthermore, at the time of the most recent examiner report, it had achieved no firm commitment that the institution would correct the violations. Another one of the agencies indicated to this Commission that correction of past violations would not be effected until proposed enforcement guidelines were adopted in final form.

I. General Responsibilities

Federal supervision over commercial and mutual savings banks is carried out by the Comptroller of the Currency,[1] the Board of Governors of the Federal Reserve System,[2] and the Federal Deposit Insurance Corporation.[3] Federal supervision of savings and loan associations[4] is carried out through the Federal Home Loan Bank System, which consists of the Federal Home Loan Bank Board, the

[1] 12 U.S.C. §§ 1–215, 1818 (1976). As administrator of national banks, COC is responsible for the execution of laws relating to these banks and promulgates rules and regulations governing their operations. COC's approval is required for the organization of new national banks, conversion of State-chartered banks into national banks, consolidations or mergers of banks where the surviving institution is a national bank, and the establishment of branches by national banks. National banks automatically receive the benefit of Federal Deposit Insurance Corporation deposit insurance; they are members of the Federal Reserve System; and they are protected by Federal statute from certain forms of State taxation.

[2] 12 U.S.C. §§ 221–522 (1976). The Federal Reserve System is composed of the Board of Governors, which is its policymaking body; the Open Market Committee, which sets regulations for the Reserve Banks' purchase and sale of securities in the open market; the 12 Federal Reserve Banks and their 24 branches situated in the different sections of the country; the Federal Advisory Council, which advises the Board of Governors on general business conditions and other matters within FRB's jurisdiction; the Consumer Advisory Council, which advises the Board on a broad range of consumer and civil rights issues; and the member banks, which include all national banks in the United States and such State banks and trust companies as have voluntarily applied to the Board of Governors for membership and have been admitted to the system. One of the FRB's most important tasks is to regulate its member banks. The FRB determines general monetary, credit, and operating policies for the system as a whole. It also sets the requirements for reserves to be maintained by member banks against deposits and limits the interest rates which may be paid by member banks on their saving deposits.

[3] 12 U.S.C. §§ 1811–1832 (1976). FDIC automatically insures deposits of member banks of the Federal Reserve System. It also insures State-chartered, non-Federal Reserve member commercial banks and mutual savings banks which voluntarily apply for and are granted the benefits of FDIC insurance.

[4] 12 U.S.C. §§ 1421–1449 (1976). See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. II, *To Provide. . .For Fair Housing* (1974), pp. 144–45 (hereafter cited as *To Provide. . .For Fair Housing*).

Federal Home Loan banks, and the Federal Savings and Loan Insurance Corporation.[5]

The existing regulatory structure has been characterized as confusing.[6] Members of Congress, along with other groups and knowledgeable individuals, have periodically recommended consolidation and restructuring of what have been considered overlapping functions carried out by these agencies.[7]

Each of the four agencies, through the important process of bank examination, is expected to maintain close supervision over the banks within its examination authority.[8] National banks are examined by the Comptroller of the Currency; State-chartered Federal Reserve System member banks are examined by the Board of Governors of the FRS; and State-chartered nonmember FDIC-insured banks are examined by the Federal Deposit Insurance Corporation.[9] Examination of savings and loan associations is carried out by FHLBB.[10]

The Federal financial regulatory agencies regulate institutions which control nearly 80 percent of the Nation's mortgage market.[11] Therefore, they have

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[5] In August 1978, the Commission submitted a draft of this chapter to each of the Federal financial regulatory agencies for comment. In response to the draft, COC stated:

> We are pleased to respond to your August 1, 1978 letter requesting our comments on the Commission's draft report to be presented to the President's Reorganization Task Force. The draft report has been reviewed with great interest by staff of the Office of the Comptroller of the Currency (OCC). We recognize that our enforcement efforts in the past were not entirely satisfactory, but we are not aware of any regulatory or administrative agency who has a more aggressive enforcement program at the present time. Therefore, one of our fundamental criticisms of the report is that the draft appears to ignore much of the significant efforts and resources the OCC has taken to ensure a strong and effective Fair housing enforcement program within the last two years. The report fails to recognize OCC's current programs in the area of fair housing examinations and our plans for future development in fair housing enforcement. . . .
>
> The report does not give sufficient consideration to additional positive actions the OCC is taking to strengthen its enforcement programs. . . .
>
> We recommend that the Commission review our [more detailed] comments, which serve to illustrate some of the more obvious problems in the report. Additionally we request that the material accompanying this letter also be reviewed as part of our comments. Thomas W. Taylor, Associate Deputy Comptroller, Comptroller of the Currency, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 18, 1978, p. 1 (hereafter cited as COC comments).

FDIC commented:

> We are pleased to see that the draft report gives appropriate recognition to this Corporation's recent efforts to develop programs for monitoring compliance by insured State nonmember banks with the Fair Housing Act and other laws designed to assure access to credit by all qualified borrowers without regard to race, religion, sex, national origin or any other factor unrelated to credit worthiness. The draft report also recognizes the increased examiner training in fair housing lending and other civil rights and consumer areas, the promulgation of instructions for investigating fair housing lending complaints and changes in organization providing for the Office of Consumer Affairs and Civil Rights. We believe that these developments have enhanced the ability of FDIC to provide more effective enforcement of the various civil rights laws, particularly as they pertain to bank lending. We, of course, recognize that this effort is, and must be, an ongoing effort and improvement of examination and enforcement techniques in these areas will be a constant goal. Roger A. Hood, Assistant General Counsel, FDIC, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 16, 1978, p. 1 (hereafter cited as FDIC comments).

The comments and accompanying material from all four regulatory agencies have been reviewed. As a result, factual inaccuracies have been corrected and new information has been added. In addition, the report has been revised to reflect the agency's position, as well as that of the Commission, in those instances in which an agency and this Commission differ.

[6] See U.S. General Accounting Office, *The Debate on the Structure of Federal Regulation of Banks* (Apr. 14, 1977).

[7] Ibid. FDIC commented:

> . . .we believe that it would be more accurate to characterize the functions of the banking regulatory agencies as "parallel functions" rather than overlapping. In the vast majority of cases, the regulations and jurisdiction for compliance and enforcement are rather distinctly divided among the regulatory agencies with respect to distinct classes of banks. FDIC comments, pp. 1 and 2.

[8] In response to a draft version of this report, COC commented:

> . . .the draft report does not appear to fully take into account that as one of the agencies responsible for enforcement of fair housing laws, the OCC, along with the other financial regulatory agencies, occupies a unique position to ensure compliance with these laws through on-site examinations. We believe that the report does not appropriately reflect the distinction between an agency which has an ongoing examination program which regularly reviews compliance, and an agency which must rely on complaints or other indicia to trigger its investigatory procedures. As the regulatory agency with enforcement authority over national banks, the OCC has approximately 2,000 examiners in the field who conduct continual examinations. These examinations are conducted in conformity with written procedures which represent how the agency enforces substantive provisions of laws and are well understood by national banks. COC comments, p. 1.

The Commission believes, however, that, to the contrary, it has from the outset attempted to emphasize the important mechanism which the examination process provides the financial regulatory agencies in enforcing compliance with equal lending laws. Indeed, the Commission has devoted an entire section of this chapter to that process. That section discusses the number of examiners engaged in the fair lending component of the examination, the schedule of examination, the procedures which the examiners follow, and the outcome of those examinations. See section IIIB of this chapter.

[9] Authorization for COC's examination of national banks is outlined in 12 U.S.C. § 481 (1976). Authorization of Federal Reserve Board examination of State member banks in their districts is outlined in 12 U.S.C. § 325 (1976). FDIC receives authorization for examination of State nonmember banks of the system in 12 U.S.C. § 1820(b) (1976).

[10] The authority for FHLBB examinations is found at 12 U.S.C. § 1464(a) (1976) for federally-chartered savings and loan institutions and at 12 U.S.C. § 1726(b) (1976) for State-chartered savings and loan institutions.

[11] Savings and loan associations controlled 54.1 percent of the market in 1976; commercial banks, 19.3 percent; and mutual savings banks, 6.2 percent. Mortgage Bankers Association of America, Economics and Research Department, "Mortgage Banking 1976," *Trends Report*, no. 21 (October 1977). FRB has stated, however, that while the 19.3 percent figure is accurate, it is in the Board's view misleading, since it represents mortgage originations, and not the total dollar value of residential mortgage loans retained by commercial banks. FRB places that figure at under 2 percent for State member banks as of June 30, 1977. Federal Reserve Board Staff Comments on Chapter 3 of the U.S. Civil Rights Commission's Draft Report, p. 1, transmitted as an attachment to letter from Janet Hart, Director, Division of Consumer Affairs, FRB, to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 16, 1978 (hereafter referred to as FRB comments). The Commission, however, does not believe that the 19.3 percent figure is misleading. Discrimination is most likely to occur in the mortgage origination process, and the fact that commercial banks may not retain the majority of such loans in their portfolios in no way changes what transpires during the origination process.

much to do with whether minorities and women have an equal opportunity to purchase homes in this country. Their role and activities in fair housing lending are discussed in the following sections.[12]

II. Fair Housing Responsibilities

A. Statutes

In conjunction with their other responsibilities, the Federal financial regulatory agencies are responsible for ensuring that the institutions they oversee are in compliance with applicable laws, including fair housing laws. As of February 1978, there were five principal statutes which imposed fair housing and related requirements on financial institutions, and which created specific responsibilities for one or more of the four Federal financial regulatory agencies. These statutes are: Title VIII of the Civil Rights Act of 1968;[13] Title VI of the Civil Rights Act of 1964;[14] the Equal Credit Opportunity Act (ECOA);[15] the Home Mortgage Disclosure Act (HMDA);[16] and the Community Reinvestment Act of 1977 (CRA).[17]

1. Title VIII

Beyond the general responsibility of the agencies to ensure compliance with all applicable laws, all four Federal financial regulatory agencies are charged with an affirmative duty to ensure compliance with Title VIII by the institutions they regulate. Section 808(d) requires all executive departments and agencies to administer "their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title," and to "cooperate with the Secretary to further such purposes."[18]

2. Title VI

To the extent that regulated financial institutions are recipients of Federal financial assistance by way of grant, loan, or contract—other than a contract of insurance or guaranty—they are subject to and required to comply with Title VI of the Civil Rights Act of 1964.[19]

All Federal agencies which provide financial assistance are directed by Section 602 of the act to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."[20] The section also states that compliance with the act may be effectuated:

> by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement. . . .[21]

It has been argued that advances made by the Federal Reserve Banks and the Federal Home Loan Banks to member institutions constitute Federal assistance by way of loan, and recipient institutions are thus subject to the statute's prohibitions.[22] As of February 1978, only FHLBB had acknowledged a Title VI responsibility by issuing implementing regulations.[23]

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[12] See *To Provide. . .For Fair Housing* for a more detailed discussion of the fair housing activities of these agencies before 1975 and for a more indepth discussion of their general responsibilities.

[13] 42 U.S.C. §§ 3601–3619, 3631 (1970 and Supp. V. 1975).

[14] 42 U.S.C. §§ 2000d–2000d–6 (1970).

[15] 15 U.S.C. §§ 1691–1691f (1976).

[16] 12 U.S.C. §§ 2801–2809 (1976).

[17] 12 U.S.C.A. §§ 2901–2905 (West Supp. 1978).

[18] 42 U.S.C. § 3608(c) (1970). One of the four Federal financial regulatory agencies, the Federal Reserve Board, disputes the assertion that Section 808(d) applies to its programs. It wrote to this Commission:

> Although the Federal Reserve examines State member banks to ensure compliance with the Fair Housing Act, it is not an 'executive department or agency' within the purview of § 808(d) of that act, nor does it administer any "programs and activities relating to housing and urban development. . ." within the meaning of that section. FRB comments, p. 1.

This Commission, however, concurs with the Department of Justice which has stated:

> This [Section 808(d)] indicates to us that federal regulatory agencies have to do more than make sure that they themselves do not violate the law; they must take affirmative steps to make sure that their programs and activities relating to housing are such as promote the purposes and policies of Title VIII. . . .

In addition, the Senate Committee on Banking, Housing, and Urban Affairs, citing the Federal Home Loan Bank Board's responsibilities under Section 808(d), has stated, "There is no doubt that the same mandate extends to the other three bank regulatory agencies, which supervise and examine lending institutions that hold in excess of $125 billion in one-to-four-family home mortgage loans." U.S., Congress, Senate Committee on Banking, Housing and Urban Affairs, *Report on Fair Lending Enforcement by the Four Federal Financial Regulatory Agencies*, 94th Cong., 2d Sess., June 3, 1976, S. Rpt. 94–930, p. 2 (hereafter cited as Senate Report No. 94–30).

[19] 42 U.S.C. §§ 2000d–6–2000d–6 (1970).

[20] 42 U.S.C. § 2000d–1 (1970).

[21] *Id.*

[22] See D.A. Searing, "Discrimination in Home Finance," 48 Notre Dame Law. 1113 (1973). The FRB observes:

> The Federal Reserve does not interpret its discount window operations as constituting "Federal financial assistance" within the meaning of Title VI of the Civil Rights Act of 1964.
>
> Since the Federal Reserve believes that its discount window operations do not involve "Federal financial assistance," it does not believe that it is "directed" to issue regulations governing such assistance. FRB comments, p. 1.

[23] 12 C.F.R. §§ 529.7–5219.12 (1977). These regulations are discussed later in this section.

3. *ECOA*

The responsibilities of the four Federal financial regulatory agencies under the ECOA[24] are specified in great detail in the act. The Board of Governors of the Federal Reserve System is charged under Section 703 with the responsibility for:

- Prescribing overall regulations for carrying out the purposes of the act;[25] and
- Establishing a consumer advisory council to consult with the Board on the exercise of its functions under the Consumer Credit Protection Act.[26]

All four financial regulatory agencies are also charged with enforcement responsibilities. The Comptroller of the Currency enforces ECOA with respect to national banks; the Board of Governors of the Federal Reserve System covers all other FRS member institutions; the Board of Directors of FDIC enforces the act for all FDIC-insured banks which are not FRS members; and FHLBB enforces ECOA with regard to savings and loan institutions.[27] Finally, notwithstanding Section 703's delegation of primary responsibility for promulgating regulations to the Federal Reserve Board, Section 704(d)clearly states that the authority of the FRB to issue regulations "does not impair the authority of any other agency" with ECOA enforcement responsibilities "to make rules respecting its own procedures in enforcing compliance" with ECOA.[28]

4. *Home Mortgage Disclosure Act*

Since mid-1976, HMDA[29] has imposed requirements on certain depository institutions, specifically:

> any commercial bank, savings bank, savings and loan association, building and loan association, homestead association (including cooperative banks) or credit union which makes federally related mortgage loans,[30] which has a home office or branch office located within a standard metropolitan statistical area, and which has more than $10 million in assets.[31]

HMDA requires those institutions to disclose annually, by census tracts or ZIP code, the total number and aggregate dollar amount of their mortgage loans.[32] The disclosure statements are to be made available for public inspection and copying.[33] The act states:

> The purpose of this [act] is to provide the citizens and public officials of the United States with sufficient information to enable them to determine whether depository institutions are filling their obligations to serve the housing needs of the communities and neighborhoods in which they are located and to assist public

[24] 15 U.S.C. § 1691(a)–(b) (1976).

[25] FRB complied with this requirement with the issuance of Regulation B, 42 Fed. Reg. 1242–1263 (1977) (to be codified in 12 C.F.R. § 202), which became effective on Mar. 23, 1977. The regulation is discussed later in this section.

[26] ECOA is part of the Consumer Credit Protection Act. P. L. 94–239, 90 Stat. 251 (1976). COC, FRB, and FDIC are directed to secure compliance by means of enforcement provisions found in Section 8 of the Federal Deposit Insurance Act (12 U.S.C. § 1828). FHLBB is directed to utilize the enforcement machinery contained in sections of the Home Owners Loan Act of 1933 (12 U.S.C. § 1464(d)), the National Housing Act (12 U.S.C. § 1727), and the Federal Home Loan Bank Act (12 U.S.C. §§ 1426, 1437). Each of the four agencies is also empowered by Section 704 to utilize "any other authority conferred on it by law" in order to secure compliance with ECOA. These sections constitute the major sanction powers of the agencies, including their respective authority to issue cease and desist orders, remove or suspend officers or directors of financial institutions, terminate deposit insurance, revoke membership, appoint receivers, and deny applications for new deposit facilities. FRB has observed, however, that:

> Under 12 U.S.C. § 1818(e), the banking agencies can remove an officer or director only if three conditions are met: (1) the officer or director has violated a law, engaged in unsafe or unsound practices or breached a fiduciary duty; (2) the bank or its depositors will suffer damage; and (3) the complained of action resulted from the officer's or director's "personal dishonesty." The last condition probably could not be satisfied in ECOA or HMDA enforcement proceedings. The banking agencies repeatedly have asked for expanded removal powers, and legislation providing for that authority is currently pending in the Congress. FRB comments, p. 2.

[27] 15 U.S.C. §§ 1691b(a)–(b) (1976).

[28] 15 U.S.C. § 1691c(d) (1976). Consistent with this provision, proposed corrective action guidelines have been developed to correct violations of Regulation B. This has been a cooperative effort of the Federal Reserve Board, the FDIC, the FHLBB, and the National Credit Union Administration. The guidelines are discussed *infra*.

[29] 12 U.S.C. §§ 2801–2809 (1976). The act took "effect on the one hundred and eightieth day beginning after December 31, 1975." § 2808. The authority granted under the act is to "expire four years after its effective date." § 2809.

[30] FRB's regulation pursuant to HMDA, commonly referred to as Regulation C (12 C.F.R. § 203.2(d) (1977), defines "federally related mortgage loan" as:

> . . .[A]ny loan (other than temporary financing such as a construction loan) which (i) is secured by a first lien on residential real property (including individual units of condominiums and cooperatives) that is designed principally for the occupancy of from one to four families and is located in a State; and (ii) (A) is made in whole or in part by a depository institution the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by a depository institution which is regulated by any agency of the Federal Government; or (B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary of Housing and Urban Development or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by any other such officer or agency; or (iii) is intended to be sold by the depository institution that originates the loan to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation. 12 C.F.R. § 203.2.

[31] 12 U.S.C. § 2808 (1976).

[32] 12 U.S.C. § 2803 (1976). The impetus behind the enactment of HMDA can be found in the act itself. It states: "The Congress finds that some depository institutions have sometimes contributed to the decline of certain geographic areas by their failure pursuant to their chartering responsibilities to provide adequate home financing to qualified applicants on reasonable terms and conditions." *Id.* at § 2801(a).

[33] 12 U.S.C. § 2803 (1976).

officials in their determination of the distribution of public sector investments in a manner designed to improve the private investment environment.[34]

HMDA imposes enforcement requirements on each of the Federal financial regulatory agencies and charges FRB with prescribing implementing regulations.[35] FRB has responsibility for enforcing the act and the regulations with respect to member banks of the Federal Reserve System which are not national banks; COC is to enforce the act and the regulations with respect to national banks; FDIC is to enforce the act and the regulations with respect to banks that are FDIC-insured but are not members of the Federal Reserve System; and FHLBB is to enforce the act with respect to savings and loan institutions that are members of the Federal Home Loan Bank Board System.[36] The agencies are to utilize their usual enforcement measures, such as cease and desist, termination of charters, and removal of directors to ensure compliance with HMDA.[37]

HMDA prescribes that FHLBB, "with the assistance of" the Secretary of HUD, the Director of the Bureau of the Census, COC, FRB, FDIC, and such persons as FHLBB deems appropriate, shall develop or assist in the improvement of methods of matching addresses and census tracts to facilitate compliance by depository institutions in as economical a manner as possible with HMDA requirements.[38] HMDA also states:

> The Federal Home Loan Bank Board shall recommend to the Committee on Banking, Currency, and Housing of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate such additional legislation as the Federal Home Loan Bank Board deems appropriate to carry out the purposes of this Title.[39]

5. Community Reinvestment Act

CRA, which was enacted October 12, 1977,[40] states congressional findings that regulated financial institutions are required by law to "demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business." The act further specifies the congressional finding that "convenience and needs" should include credit needs.[41] CRA does not delineate the steps by which the institutions covered by the act are to demonstrate that they are meeting these needs.

The act directs each Federal financial regulatory agency, in connection with its examination of a financial institution within its jurisdiction, to assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods. The agency is to take this record into account in evaluating an institution's "application for a deposit facility."[42]

CRA also charges each of the Federal financial regulatory agencies with writing implementing regulations for its enforcement. The regulations are to be in force not later than November 6, 1978.[43] The agencies issued a proposed version of the required regulations in July 1978.[44]

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[34] 12 U.S.C. § 2801(b) (1976). Subsequent to the enactment of HMDA, the Senate Committee on Banking, Housing, and Urban Affairs recommended that the Federal financial regulatory agencies utilize statistics required by the act "to look for possible redlining" during the "regular bank examination process." Senate Report No. 94-930; and Representative Henry Reuss, letter to Arthur Burns, Chairman, Board of Governors of the Federal Reserve System, June 11, 1976.

[35] 12 U.S.C. § 2804(b) (1976). FRB did so with the publication of Regulation C, 12 C.F.R. § 203 (1977), which became effective June 29, 1976.

[36] 12 U.S.C. § 2804(b) (1976).

[37] See HMDA, 12 U.S.C. § 2804(b) (1976). FRB, COC, and FDIC are to enforce HMDA through measures given them in 12 U.S.C. § 1818. FHLBB is to enforce the act through measures available to it under 12 U.S.C. § 1464(d), 1730, 1426(i), and 1437 (1976). The enforcement measures available to the agencies are discussed in connection with the section on ECOA.

[38] 12 U.S.C. §2806(a)(1) (1976).

[39] 12 U.S.C. § 2806(b) (1976). FRB is to determine the feasibility of requiring institutions outside SMSAs to comply with the act and is to report on this determination to Congress by December 1978. § 2807. FRB informed this Commission that the study is "underway" and will be submitted to Congress by the required date. FRB comments, p. 2.

[40] The Community Reinvestment Act is Section 8 of the Housing and Community Development Act of 1977, P.L. No. 95-128, 91 Stat. 1111 (1977).

[41] 12 U.S.C.A. § 2901(a)(2) (West. Supp. 1978).

[42] 12 U.S.C.A. § 2902(3) (West. Supp. 1978). "Deposit facility" is defined in the act as: (A) a charter for a national bank or Federal savings and loan association; (B) deposit insurance in connection with a newly chartered State bank, savings bank, savings and loan association or similar institutions; (C) the establishment of a domestic branch or other facility with the ability to accept deposits of a regulated financial institution; (D) the relocation of the home office or a branch office of a regulated financial institution; (E) the merger or consolidation with, or the acquisition of the assets, or the assumption of the liabilities of a regulated financial institution requiring approval under Section 18(c) of the Federal Deposit Insurance Act or under regulations issued under the authority of Title IV of the National Housing Act; or (F) the acquisition of shares in, or the assets of, a regulated financial institution requiring approval under Section 3 of the Bank Holding Company Act of 1956 or Section 408(e) of the National Housing Act.

[43] 12 U.S.C.A. § 2905 (West Supp. 1978). The agencies are to include in their annual reports to Congress a section outlining the actions they have taken to carry out their responsibilities under the act. 12 U.S.C.A. § 2904 (West Supp. 1978).

[44] 43 Fed. Reg. 29,918 (1978).

B. Regulations

1. Existing Regulations and Guidelines

As of May 1978, three of the four financial regulatory agencies had issued regulations affecting fair housing, pursuant to one or more of the statutes which give them fair housing responsibilities. FRB had promulgated Regulation B,[45] in response to the statutory directive in the ECOA, and Regulation C,[46] in order to comply with the mandate of HMDA. FRB had not, however, issued Title VI or Title VIII regulations.

FHLBB has issued regulations pursuant to Title VI.[47] Moreover, since 1972, FHLBB has had regulations pursuant to Title VIII.[48] In 1978, due in part to a suit brought in 1976 by several civil rights organizations, including the National Urban League and the National Committee Against Discrimination in Housing, which charged that the regulatory agencies had failed to take action to end discriminatory mortgage lending practices by their regulatees,[49] FHLBB issued a regulation combining instructions on Title VIII, ECOA, and CRA. A final version, which amends and revises FHLBB's Title VIII regulation, was issued in May 1978.[50]

FDIC, as the result of the *National Urban League* suit, has also issued a regulation combining instructions on Title VIII and ECOA.[51] Although FDIC has proposed and considered Title VIII regulations for well over 5 years,[52] this regulation as finalized will be FDIC's first regulatory interpretation of fair housing law.

The COC has neither issued nor proposed any fair housing regulations. COC has stated:

> [T]he Comptroller of the Currency is not required to issue regulations or base an enforcement effort on other fair housing regulations in order to use statutory enforcement authority against national banks. The statutory power of enforcement vested in this Office are found in Section 8 of the Federal Deposit Insurance Act, as amended by the Financial Institutions Supervisory Act of 1966. [12 U.S.C. Section 1818.b]. Accordingly, the Comptroller may issue a cease and desist order where there is reasonable cause to believe that a national bank has violated, is violating, or is about to violate any law, rule or regulation. Therefore, this Office could issue such an order based simply upon a violation of Title VIII of the Civil Rights Act of 1968 since it would be a violation of law.[53]

Although this statement may represent an accurate description of COC's authority, it does not constitute a rationale for COC's failure to issue regulations. The issuance of substantive and/or procedural regulations is a valid exercise of administrative power vested in the agencies,[54] and the financial regulatory agencies have a responsibility to use that authority effectively. Regulations and guidelines serve as the principal means by which agencies interpret and clarify substantive provisions of law, while at the same time advising regulatees and the general public as to how the law will be procedurally enforced.[55]

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[45] 12 C.F.R. § 202 (1977), as amended by 42 Fed. Reg. 1242–1263 (1977).
[46] 12 C.F.R. § 203 (1977).
[47] 12 C.F.R. § 529 (1977).
[48] 12 C.F.R. § 528 (1977).
[49] National Urban League, *et al.* v. OCC, *et al.*, CA No. 76–0718, (D.D.C.).
[50] The proposed regulation appears in 42 Fed. Reg. 58,182 (1977). The final version of the regulation is at 43 Fed. Reg. 22,332 (1978).
In response to a draft version of this report, FHLBB remarked that in addition: "the Federal Register Document for 12 CFR 528. . .refers to the close relationship between the Fair Housing Act and the Community Reinvestment Act. CRA will be implemented in a separate regulation." Lacy Griffin, Director, Consumer Division, Office of Community Investment, FHLBB, letter to Cynthia N. Graae, Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, Aug. 15, 1978 (hereafter referred to as FHLBB comments).
[51] 43 Fed. Reg. 11,563–11,568 (1978) (to be codified in 12 C.F.R. Part 338).
[52] 37 Fed. Reg. 19,385–19,386 (1972). See *To Provide. . .for Fair Housing*, pp. 151–58 for a discussion of past FDIC regulatory proposals.
[53] John G. Heimann, Comptroller of the Currency, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Nov. 8, 1977, p. 11 (hereafter cited as Heimann letter).
[54] See, for example, the discussion of this point in Laufman v. Oakley Building and Loan, 408 F. Supp. 489 (S.D. Ohio 1976); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); and Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).
[55] COC has stated:

> We agree with the concept that regulations and guidelines can serve a useful purpose, as the report states, to "interpret and clarify substantive provisions of the law, while at the same time advising regulatees and the general public as to how the law will be procedurally enforced." The Commission should be aware of the possible adverse impact of government regulations on the cost of housing. The OCC has taken measures which, in effect, provide guidelines for compliance for national banks. Indeed this Office has never issued regulations for the sake of regulation, particularly in the instant case when there is nothing substantive which could be issued in addition to the provisions of Regulation B. The Federal Reserve has not issued Title VIII regulations. The referenced FDIC regulations are limited to basically addressing the data collection and analysis system. As noted above, the OCC will soon be adopting our own such system. The FHLBB has issued substantive Title VIII regulations, but the main element they contain which goes beyond Regulation B involves interpretation of the "effects test." The "effects test," which arose from court decisions, is a very complicated area. It is the OCC's present belief that until the courts have addressed the matter in further decisions relating to credit, it should remain a judicial doctrine, rather than administrative. We have addressed this issue in our examination procedures and instructions (copies attached), and are considering additional ways of addressing this problem. The "overwhelming" body of opinion that favored the issuance of Title VIII regulations did so before the issuance of Regulation B and its attendant enforcement procedures. COC comments, pp. 2 and 3.

The Commission believes that the data collection references in FDIC's

An overwhelming body of opinion has favored issuance of Title VIII regulations by Federal financial regulatory agencies. As early as 1969, HUD suggested to the agencies that they develop regulations or instructions binding on the institutions they regulate.[55] Similar recommendations were made by the Department of Justice in 1976 during equal lending hearings before the Senate Committee on Banking, Housing, and Urban Affairs. The Assistant Attorney General for Civil Rights, J. Stanley Pottinger, made the following statement before the Committee: "I believe that Congress specifically contemplated vigorous enforcement activity by the bank regulatory agencies when considering passage of the Fair Housing Act [Title VIII]." Mr. Pottinger remarked that enforcement activity under the Fair Housing Act by the regulatory agencies should be divided into five discrete areas, one of which was the promulgation of regulations for interpreting that title.[57]

In a report of these hearings, the Senate Committee on Banking, Housing, and Urban Affairs made a number of findings and conclusions. The Committee stated that there had been a "generally unsatisfactory history of enforcement activities by all four agencies."[58] Among the deficiencies which the Committee cited was the failure of the three bank regulatory agencies to issue regulations on fair lending.[59] The *National Urban League* suit, however, has perhaps served as the greatest impetus for the issuance of Title VIII regulations by the agencies, as well as other improvements in their fair housing enforcement programs.[60]

2. Evaluation of Fair Housing Regulations

Regulation B

Regulation B, issued by FRB pursuant to the ECOA, pertains to discrimination in all areas of credit access, including but not limited to transactions related to fair housing. In addition to its data collection provisions,[61] Regulation B represents a positive development in a number of respects:

- The regulation prohibits discriminatory conduct designed to discourage potential applicants as well as direct discrimination in the application process itself.[62]
- Pursuant to the ECOA requirement that creditors notify applicants of the reason for denials of credit, the regulation gives reasonably comprehensive examples of the types of specific reasons which must be included in creditor notification.[63]
- The regulation offers specific guidance on requirements imposed on creditors who release credit history information to third parties.[64]
- The regulation specifically prohibits a number of discriminatory or potentially discriminatory inquiries by creditors in connection with credit applications, including questions relating to an applicant's spouse (except where a spouse or the spouse's property may be subject to liability resulting from credit transactions), an applicant's birth control practices, or an applicant's race, color, sex, religion, or national origin.[65]

There are, however, a number of areas in which Regulation B is deficient.[66] One of the more serious is the regulation's failure to include clear guidance on how Federal agencies should proceed with enforcement actions based on violations of the ECOA or Regulation B. The regulation merely

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regulations and the "effects test" principle in FHLBB's regulation and guidelines constitute critically important provisions which should be reflected in COC regulations. This Commission concurs with COC that excessive regulation can be damaging, but believes that the absence of comprehensive nondiscrimination regulations places a heavy burden upon those minorities and women who meet with discrimination when they apply for mortgage loans.

[55] See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort* (1971), p. 169.

[57] J. Stanley Pottinger, Assistant Attorney General for Civil Rights (statement before the Committee on Banking, Housing, and Urban Affairs, United States Senate, Concerning Enforcement of the Fair Lending Provisions of Title VIII of the Civil Rights Act of 1968, Mar. 12, 1976), p. 9.

[58] S. Rep. No. 94-930, 94th Cong., 2d sess. (June 3, 1976).

[59] Ibid.

[60] National Urban League *et al.* v. OCC, *et al.*, CA No. 76-0718, (D.D.C.) Among the other improvements which the plaintiffs sought, and achieved with FHLBB, FDIC, and COC, with whom they settled out of court, are: increased racial, ethnic, and sex data collection activities and additional fair housing personnel. See National Urban League v. FHLBB, No. 76-0718 (D.D.C. Mar. 22, 1977) (Settlement agreement), National Urban League v. FDIC, No. 76-0718 (D.D.C. May 13, 1977) (Settlement agreement); and National Urban League v. OCC, no. 76-0718 (D.D.C. Nov. 30, 1977) (Settlement agreement). The suit against FRB was dismissed on May 3, 1978, without a decision on the merits, based on the lack of standing of the plaintiffs.

[61] 42 Fed. Reg. 1242, 1261 (1977) (to be codified in 12 C.F.R. § 202.13). Issues related to regulatory data collection requirements and their use are discussed in section III of this chapter.

[62] 12 C.F.R. § 202.5(a) (1977).

[63] 12 C.F.R. § 202.9(b)(2) (1977). These reasons include, for example, insufficient credit references, excessive obligations, inadequate collateral, and length of employment.

[64] 12 C.F.R. § 202.10 (1977).

[65] 42 Fed. Reg. 1242, 1254-1260 (1977) (to be codified in 12 C.F.R. §§ 202.5(a), (d)(3)-(d)(5), 202.9, 202.10). However, as discussed in section III A, creditors are required by Regulation B to collect information on race, national origin, sex, marital status, and age for monitoring compliance with 42 Fed. Reg. 1242, 1261 (1977) (to be codified in 12 C.F.R. § 202.13(a)(1)).

[66] The deficiencies of the regulation's data collection requirements are discussed in section III of this chapter.

states the general statutory language granting administrative enforcement responsibility to specific agencies.[67]

In 1975, in comments on two proposed versions of Regulation B, this Commission stated that the omission of an enforcement provision was "the most serious deficiency in the regulation, and could result in failure of creditors to carry out fully the mandate of the Act." The Commission suggested that the enforcement provision cover such matters as standards for complaint handling, including time limits and instructions for the scope of investigations; procedures and time limits for achieving voluntary compliance after any findings of discrimination have been made; time limits for notification of noncompliance; and sanctions.[68] FRB commented that:

> Regulation B does not provide "guidance on how Federal agencies should proceed with enforcement actions. . ." since enforcement authority (except regarding State member banks) is expressly reserved to other agencies by § 704(d) of the ECOA, 15 U.S.C. § 1691(c). The Federal financial supervisory agencies have issued for comment proposed uniform guidelines for enforcing ECOA and the Fair Housing Act (43 F.R. 29,256 (July 6, 1978)).[69]

However, the need for such enforcement procedures remains unmet, as the regulatory agencies' proposed uniform guidelines do not contain adequate enforcement provisions.

A further shortcoming of Regulation B, which this Commission has noted previously,[70] is its failure to include adequate guidance for applying the "effects test" definition of discrimination to the field of credit as Congress intended.[71] The "effects test" dictates that the impact of, not the motivation behind, a particular practice is to be the threshold consideration in determining whether that practice establishes a prima facie case of discrimination. Although FRB acknowledges that Congress intended the "effects test" to be applied to credit practices,[72] FRB does not go far enough in the regulation to meet its responsibility to define clearly the "effects test" for its regulatees. Nowhere in the text of Regulation B does FRB clearly state what is required by the "effects test," or that this doctrine is to govern the judgments of enforcement agencies applying the regulation.

Regulation B does provide a sample of criteria which have been used by lenders to judge creditworthiness[73] but have the effect of discriminating and are therefore prohibited by ECOA. These examples include likelihood of childbearing, having a telephone in one's own name, and discounting of part-time income sources.[74] However, the examples are too few and appear to be criteria which primarily would adversely affect women. It is important that practices which adversely affect minority groups also be clearly identified. An example of such a practice (which is not mentioned) is redlining.

FRB's Regulation B does mention in a footnote that:

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[67] 12 U.S.C. § 1691c (1976); 42 Fed. Reg. 1242, 1251 (1977) (to be codified in 12 C.F.R. §§ 202.1(b)(1)–(b)(2)). The administrative enforcement section of the regulation reads:

> (a) As set forth more fully in Section 704 of the Act, administrative enforcement of the Act and this Part with respect to certain creditors is assigned to the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Board of Directors of the Home Loan Bank Board acting directly or through the Federal Savings and Loan Insurance Corporation, Administrator of the National Credit Union Administration, Interstate Commerce Commission, Civil Aeronautics Board, Secretary of Agriculture, Farm Credit Administration, Securities and Exchange Commission and the Small Business Administration. (b) Except to the extent that administrative enforcement is specifically committed to other authorities, Section 704 of the Act assigns enforcement of the Act and this Part to the Federal Trade Commission. 12 C.F.R. §§ 202.12(a) and (b).

[68] Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, letter to Theodore E. Allison, Secretary, Board of Governors of the Federal Reserve System, June 26, 1975 (hereafter cited as Flemming letter to Allison); and Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, letter to Arthur Burns, Chairman, Board of Governors of the Federal Reserve System, Sept. 29, 1975.

[69] FRB comments, pp. 2 and 3.

[70] Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, letter to Arthur Burns, Chairman, Board of Governors of the Federal Reserve System, July 11, 1977.

[71] The legislative history of ECOA states:

> The prohibitions against discrimination on the basis of race, color, religion or national origin are unqualified. In the Committee's view, these characteristics are totally unrelated to creditworthiness and cannot be considered by any creditor. In determining the existence of discrimination on these grounds. . .courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. [1976] U.S. Code Cong. and Ad. News 403, 406.

[72] Regulation B notes in a footnote:

> The legislative history of the [Equal Credit Opportunity] Act indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness. 42 Fed. Reg. 1242, 1255 n. 7 (1977) (to be codified in 12 C.F.R. § 202.6(a), fn. 7.

[73] A creditworthiness criterion is a measure used by a lender to determine whether an applicant is likely to repay the loan for which he or she has applied.

[74] 42 Fed. Reg. 1242, 1255–1256 (1977) (to be codified in 12 C.F.R. § 202.6(b)(3)–(b)(5). The failure of Regulation B to provide adequate guidance on types of credit practices which are either absolutely prohibited or which may be prohibited if they create an adverse effect on a protected class, leaves Federal enforcement officials with no guidance in determining whether or not a lender's justification for such criteria constitutes a valid defense to a charge of discrimination.

> a creditor may not discriminate against an applicant because of the characteristics of persons to whom the extension of credit relates (e.g., the prospective tenants in an apartment complex to be constructed with the proceeds of the credit requested), or because of the characteristics of other individuals residing in the neighborhood where the property offered as collateral is located.[75]

FRB suggests defining redlining as "the arbitrary refusal to make loans relating to property located in certain geographic areas." However, this definition seems too narrow.[76] In contrast, FHLBB regulations point out that refusal to lend solely because of the age of the home or the income level in the area may have a discriminatory effect on minorities.[77]

Regulation B does not make clear that creditors are responsible for knowing whether a creditworthiness criterion is having an adverse effect on minorities or women and a) eliminating any criterion with an adverse effect or b) demonstrating that such a criterion is a valid predictor of creditworthiness and no other equally valid criterion with a lesser adverse impact, suitable for lenders needs, exists. Although Section 202.2(p) of Regulation B does raise the concept of validation of criteria used in determining creditworthiness, the principle is discussed only in the most general terms and no instructions for validation are offered.[78]

An article prepared by the Federal Reserve Board's Division of Consumer Affairs, explaining why FRB did not fully describe the effects test in the regulation, noted that although "Congress intended the effects test to be applied to cases under the [Equal Credit Opportunity Act]. . .the test is a judicial doctrine and that as such it is subject to reinterpretation and modification by the courts."[79]

The rationale, however, does not appear to justify the inadequate treatment of the effects test in Regulation B. Courts have heavily relied on regulations and guidelines of Federal agencies in defining the scope of illegal discrimination under various civil rights statutes. In *Griggs* v. *Duke Power Co.*,[80] for example, the United States Supreme Court gave great weight to the Equal Employment Opportunity Commission's Guidelines on Employment Testing Procedures. Thus it would appear that the likelihood of the "effects test" surviving in the field of credit would be enhanced if FRB were more vigorous in including it in Regulation B.[81]

FHLBB Regulations

Prior to March 1978, FHLBB was the only one of the four Federal financial regulatory agencies to have ever promulgated fair housing regulations or guidelines. FHLBB first issued Title VIII regulations in 1972,[82] and in 1973 published a guideline interpreting the regulation.[83] The 1972 regulation contained a number of very positive features:

- It applied to discrimination by member institutions in all credit transactions which affect housing, not just mortgage lending.[84]
- It extended to discrimination resulting from the race, color, religion, sex, or national origin of both applicants, such as relatives, prospective tenants, or residents in the surrounding geographic area.[85]

[75] 12 C.F.R. § 202.2(z), fn. 3.

[76] Redlining is defined and discussed in the chapter of this report on the Department of Housing and Urban Development, in connection with HUD's administrative meeting on redlining.

[77] The FHLBB guidelines give other examples of potentially effective discrimination which would affect minorities, such as denying credit because of an isolated credit experience in the past and favoring applicants who have previously owned homes. 43 Fed. Reg. 22,338 (1978) (to be codified in 12 C.F.R. § 531).

[78] 42 Fed. Reg. 1242, 1253 (1977) (to be codified in 12 C.F.R. § 202.(p)). In the field of equal employment opportunity, the need for employers to validate employee selection criteria has long been recognized. Since 1970 the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures (29 C.F.R. § 1607 (1977)) have provided both a conceptual framework for substantive guidance in validation requirements and techniques in the area of employment. The EEOC guidelines not only document specific validation methodologies, but also contain a requirement that selection criteria be tested for "fairness"; that is, be differentially validated for the minority groups or sex which are adversely affected. The Commission believes that EEOC's guidelines could provide a useful model for the FRB in developing validation requirements pursuant to ECOA.

[79] Federal Reserve Bulletin, "Equal Credit Opportunity" (February 1977), p. 107.

[80] 401 U.S. 424, 433–34 (1971).

[81] Once more, FHLBB's experience in this area appears significant. In Laufman v. Oakley Building and Loan, 408 F. Supp. 489 (S.D. Ohio 1976), the district court upheld FHLBB's authority to issue "effects test" guidelines, as well as upholding the opinion of the agency's General Counsel that the guidelines extend to redlining. The court stated, "[W]e find that the regulations and guidelines issued by the FHLBB in this instance were issued in a valid exercise of the FHLBB's authority." It also observed:

> This court is mindful of the well established dogma that agency interpretations of this nature are generally entitled to great deference. . . .And this deference is particularly appropriate where, as here, the administrative practice in question involves a contemporary construction of the statute by the officers charged with the responsibility of setting its machinery in motion and of making its parts work smoothly and efficiently.

[82] 12 C.F.R. § 528 (1972).

[83] 12 C.F.R. § 531 (1973).

[84] 12 C.F.R. § 528.2(a) (1972).

[85] 12 C.F.R. §§ 528.2(a)(2)–(4) (1972).

• The regulation instructed that complaints of discrimination in lending be forwarded to the FHLBB.[86]

In addition, the 1973 guideline lent considerably more strength to the Board's regulation. The guideline:

• Stated that the effects of a practice, rather than the motivation behind its use, will be the critical factor in establishing a prima facie case of discrimination.[87]

• Identified a number of relevant examples of discriminatory or potentially discriminatory criteria, including refusing to consider or discounting the income of female spouses and refusing to lend in neighborhoods solely due to the age of the dwellings in the area or the income levels of residents.[88]

• Declared racial redlining unlawful.[89]

• Discouraged favoring prior homeowners, or overly weighting the impact of isolated negative prior loan histories.[90]

In 1977, FHLBB proposed a new regulation and guideline for the purpose of "monitoring compliance with the Equal Credit Opportunity Act (ECOA), Title VIII of the Civil Rights Act of 1968, and other civil rights statutes which the Board enforces."[91] The regulation and guideline were finalized in 1978 and are applicable to Title VIII, ECOA, and CRA.[92]

The final versions of both the regulation and guideline are stronger than the earlier versions overall. However, the new guideline has omitted a provision of the 1973 version which is essential if Title VIII is to be enforced in the fullest sense. The guideline no longer includes the provision that a practice which is discriminatory in effect may be a violation of law even though there may have been no discriminatory intent. The provisions in the 1978 regulation which strengthen the 1972 regulation include:

• Requiring written loan underwriting standards of all member institutions.[93]

• Prohibiting redlining due to the age and location of a dwelling.[94]

• Requiring a loan application register which denotes the race, sex, marital status, and age of the applicant and co-applicant; the census tract of the property; loan terms; and final disposition of the application.[95]

• Provision for the lending institution to designate the race and/or sex of applicants on application forms where applicants fail to do so.[96]

• Prohibiting reliance on appraisals which the institution knows, "or reasonably should know, is discriminatory on the basis of age or location of the dwelling, or is discriminatory per se or in effect" under Title VIII or ECOA.[97]

The amended guideline also requires that lenders not only refrain from discriminating in their own lending practices, but also avoid doing business with developers and real estate brokers who discriminate.[98] The Commission has long advocated such a stance by the financial regulatory agencies.[99] The positive guideline changes also include:

• Discouraging lenders from requiring that persons to whom they extend loans have "done business" with the institution in the past.[100]

• Prohibiting inquiries into the childbearing intentions of applicants.[101]

• Advising institutions to review their advertising and marketing practices to ensure "that their services are available without discrimination to the community they serve."[102]

• Prohibiting "use of unfounded or unsubstantiated assumptions regarding effect upon loan risk

[86] 12 C.F.R. § 528.8 (1972). Prior to the Regulation, the equal housing lending logo had directed that complaints be filed with HUD.
[87] 12 C.F.R. § 531.8(b) (1973).
[88] 12 C.F.R. § 531.8(c)(5); 12 C.F.R. § 531.8(c)(6) (1973).
[89] 12 C.F.R. § 531.8(c)(6) (1972).
[90] 12 C.F.R. § 531.8(c)(7) (1972).
[91] 42 Fed. Reg. 58,182 (1977).
[92] 43 Fed. Reg. 22,332 (1978).
[93] This requirement will facilitate regulatory agency monitoring of equal mortgage lending and will provide the public with an awareness of credit standards lenders use. 43 Fed. Reg. 22,335 (1978). (1978).
[94] *Id.*
[95] 43 Fed. Reg. 22,336, 22,337 (1978).
[96] *Id.* This provision is permanent. It was originally proposed as a temporary measure. 42 Fed. Reg. 58,182 (1977).
[97] 43 Fed. Reg. 22,335 (1978). This provision, which was not included in the proposed regulation, is especially important in combatting redlining. It has been alleged that appraisal and underwriting practices are the primary devices by which redlining is accomplished. See, for example, National Clearinghouse for Legal Services, *Clearinghouse Review*, vol. 10, no. 7, October 1976, p. 514. Regulations issued by the California State Department of Savings and Loan in 1976, however, go further. Guidelines pursuant to the regulations list several criteria for "properly" appraising the value of a home. For example, they direct that where appraisals are significantly less than the selling price of the property, the appraisal should be supported by reporting more than three "comparable" sales. The basis for determining that another sale is "comparable," moreover, is also subject to criteria provided in the guidelines. See 10 Cal. Admin. Code, Subchapter 24, § 246 (1976).
[98] 43 Fed. Reg. 22,339 (1978).
[99] See *To Provide. . .for Fair Housing*, p. 163.
[100] 43 Fed. Reg. 22,338 (1978). This provision was not in the proposed guideline, which was published in 42 Fed. Reg. 58,955 (1978).
[101] Ibid.
[102] 43 Fed. Reg. 22,339 (1978).

of. . .the physical or economic characteristics of an area."[103]

Despite these positive features, the regulation and guideline are not as strong as their proposed versions in a few significant areas. The loan register which is required by the regulation[104] does not require notation of creditworthiness information in conjunction with race, sex, marital status, and age data as required by the 1977 proposed version;[105] the final regulation does not require reporting to FHLBB the number of loan applications received, approved, or denied (or otherwise adversely acted upon) by race, sex, and marital status, as required in the 1977 proposed regulation.[106] A major deficiency of the FHLBB regulation and guideline, is that, like Regulation B, they provide no instructions as to how and within what time frames enforcement actions are to take place.

FDIC's Fair Housing Regulation

In addition to exceptionally positive data collection requirements,[107] FDIC's regulation[108] contains a number of other features which deserve favorable commentss:

- Coverage of all types of lending (home improvement, added constructions) related to housing, not merely mortgages.
- Incorporation of FDIC's nondiscrimination poster and advertising requirements.
- Modification of FDIC's fair housing poster to inform complainants that they may file complaints with FDIC, as well as with HUD.
- Inclusion of individuals making preapplication inquiries under the protections of the regulations.[109]

The introduction to the proposed regulation[110] stated that when investigations undertaken as a result of data collection indicated discrimination, the FDIC would "take necessary corrective action, such as issuance of a cease and desist order pursuant to Section 8(b) of the Federal Deposit Insurance Act" if voluntary correction could not be achieved. However, as with Regulation B and FHLBB's regulation, a major shortcoming of FDIC's final regulation is that it contains no instruction or guidance on how investigations or other compliance activity will be conducted.

This Commission believes that such additions could be helpful; for example, they could serve to inform the public of the procedures agencies will use in collecting data and the time frames they will follow in conducting investigations and enforcement proceedings. FDIC, however, has written to the Commission:

> The report cites, as a major shortcoming of FDIC's Fair Housing Lending Regulations, the omission of any instruction or guidance or how investigations or other compliance activity will be conducted. We view a regulation to be an inappropriate vehicle for matters of this kind and, cover them when necessary in instructions to examiners or in policy statements. Our procedures are supervisory and corrective and do not create machinery for adjudicatory proceedings.[111]

FRB Regulation C Pursuant to HMDA

Regulation C[112] prescribes the data collection and disclosure requirements imposed pursuant to the Home Mortgage Disclosure Act (HMDA) on certain lenders[113] who make "federally related mortgage loans."[114] No Federal financial regulatory agency has issued procedures for action in the event that it discovers a lender has failed to maintain the data required by HMDA in the manner prescribed by the regulation. No agency has issued procedures for private citizens to follow when a lender does not make HMDA data publicly available as required by law and Regulation C.

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[103] Ibid.
[104] 43 Fed. Reg. 22,336, 22,337 (1978).
[105] 42 Fed. Reg. 58,185 (1977).
[106] 42 Fed. Reg. 58,185 (1977). California State's Department of Savings and Loan's Fair Lending Regulations include a reporting requirement. (10 Cal. Admin. Code Subchapter 24, § 246 (1976)). The provision requires that State savings and loan institutions report monthly to the State Commissioner of Savings and Loan information on each real estate and home improvement loan made, including characteristics of the loan, property, and applicant, and whether the loan were approved. The information is also to be made available to the public except when deemed by the Commissioner to abridge the rights of privacy of individual borrowers or applicants. 10 Cal. Admin. Code, Subchapter 20, § 242.2(t) (1976). FHLBB reported to this Commission:

> Although the current regulation does not require, as did the proposed regulation, reporting to the Bank Board by all institutions, the Bank Board made clear during the Board meeting that a data reporting and analysis project on a smaller scale would be conducted during the coming year and a full scale data project would be implemented on the basis of findings of that study. Section 528.6(e) authorizes the Bank Board to collect monitoring information data as it sees fit. FHLBB comments, p. 2.

[107] These requirements are discussed in section III.
[108] 43 Fed. Reg. 11,153 (1978).
[109] 43 Fed. Reg. 11,563–11,566 (1978) (to be codified in 12 C.F.R. §§ 338.1–338.3).
[110] 42 Fed. Reg. 54,567 (1977).
[111] FDIC comments, p. 2.
[112] 12 C.F.R. § 203 (1977).
[113] See discussion on the Home Mortgage Disclosure Act for a description of those lenders subject to HMDA disclosure requirements.
[114] 12 C.F.R. § 203.2(d) (1977).

The agencies are divided as to where responsibilities for promulgating such regulations lie. FDIC has written to this Commission, "Section 305(a) of the Act (12 U.S.C. 2804(a)) directs the Board of Governors to prescribe regulations to carry out the purposes of the Act. Nowhere does the Act authorize or direct FDIC to promulgate regulations relating to HMDA."[115] In contrast, FRB has stated: "Since the Federal Reserve does not exercise enforcement jurisdiction over all depository institutions subject to HMDA, including enforcement procedures in Regulation C would have been inappropriate."[116]

FHLBB's Title VI Regulations

The FHLBB is the only Federal financial regulatory agency which has acknowledged Title VI responsibilities by issuing Title VI regulations.[117] These regulations are similar to the Title VI regulations of other agencies, such as HEW and USDA. Like other Title VI regulations, they include specific procedural instructions on how enforcement proceedings should be carried out.[118] In this regard they are clearly distinguishable from FHLBB's existing fair housing regulation, as well as from Regulations B and C and FDIC's regulation. The fact that FHLBB has issued detailed procedural enforcement provisions in its regulations pursuant to Title VI serves to call attention to the failure of the four financial regulatory agencies to do so in their other regulations.

III. Compliance and Enforcement Mechanisms

A. Data Collection and Use

This Commission has advocated that the four Federal financial regulatory agencies collect and analyze relevant data as part of their fair housing enforcement efforts.[119] Since 1974 each of the four agencies has initiated some data collection and analysis. At least, in part, this has been a result of new statutory directives[120] as well as private litigation.[121]

1. Early Data Collection and Analysis Efforts (1974–75)

In *To Provide. . .For Fair Housing,* the Commission noted that all four of the agencies had recently launched a pilot data collection project.[122] Each of the agencies undertook to gather data for 6 months in certain standard metropolitan statistical areas (SMSAs)[123] on the race, ethnic origin, and/or sex of mortgage borrowers and the census tracts for which mortgage loans were made. Using three separate forms, designated forms A, B, and C,[124] each of the regulatory agencies conducted surveys designed to identify disparate treatment of protected classes in mortgage financing.

The surveys were carried out between June and November of 1974, and involved three separate approaches. The Form A survey was designed and conducted by FHLBB; the Form B survey by the FRB and FDIC; and the Form C survey by COC. Only the Form A survey collected information on the sex and marital status of applicants and only the Form C survey collected creditworthiness informa-

[115] FDIC comments, p. 2.
[116] FRB comments, p. 3.
[117] 12 C.F.R. §§ 529.1–529.10 (1977).
[118] 12 C.F.R. §§ 529.7–529.10 (1977). This Commission has made three principal criticisms of Federal agency Title VI regulations: 1) They provide an inadequate definition of prohibited discrimination; 2) they lack detailed provisions for investigations and racial and ethnic data collection; and 3) they provide inadequate instruction with regard to remedial action for past discrimination. U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort, Vol. VI, To Extend Federal Financial Assistance* (1976) p. 704.
[119] See *To Provide. . .For Fair Housing,* pp. 188–90.
[120] HMDA, 12 U.S.C. §§ 280–2809 (2976). HMDA requires data collection by covered lending institutions. Regulation B, issued pursuant to ECOA, also requires lenders to collect certain data. FRB has noted that:

> The monitoring information provision of Regulation B (12 C.F.R. § 202.13) and the substitute monitoring programs of the FHLBB and FDIC are not dictated by ECOA; they represent the agencies' independent judgments regarding the most appropriate enforcement mechanisms. FRB comments, p. 3.

[121] See the settlements in National Urban League v. FHLBB, No. 76-0718 (D.D.C. Mar. 22, 1977) (Settlement agreement); National Urban League v. FDIC, No. 76-0718 (D.D.C. May 13, 1977) (Settlement agreement); National Urban League v. OCC, No. 76-0718 (D.D.C. Nov. 30, 1977) (Settlement agreement).
[122] See *To Provide. . .For Fair Housing,* pp. 188–89, for a more detailed discussion.
[123] An SMSA consists of a county or group of counties containing at least one city with a population of 50,000 or more and adjacent counties which are economically and socially integrated with the central city. U.S., Department of Commerce, Bureau of the Census, *Public Use Samples of Basic Records from the 1970 Census: Description and Technical Documentation* (1971), p. 135.
[124] These forms appeared as part of FHLBB's 1974 fair housing regulations. 12 C.F.R. § 528.6 (1977). These forms have been discontinued and the loan application register, discussed later in this chapter, will be used instead.

tion. Thus the survey designs limited their usefulness.[125] Since *To Provide. . .For Fair Housing* was published, the agencies have completed the surveys and have provided the Commission with information on the results.

Despite the limitations of the surveys, the results of each indicated deviant lending patterns. For example, on all three surveys the proportion of minority applications which were rejected was greater than for nonminorities. This was true for all minority groups. Form A indicated that the rejection rate was higher for women than men and higher for single than married persons. Form C indicated that higher rejection rates for minorities, women, and single persons occurred even when other factors were held constant. For example, the higher rejection rate of minorities occurred even when years in present position, level of debt, total assets, or size of loan request was held constant.[126] Nonetheless, the surveys resulted in little corrective action being taken with respect to the affected lending institutions.[127]

2. Regulatory Data Collection and Analysis Provisions

Regulation B

Regulation B requires that creditors subject to ECOA retain all applications of credit, including mortgages, along with the creditor's notice of actions taken for a period of 25 months following the credit decison. Moreover, creditors under investigation for a violation of ECOA or Regulation B must retain these records "until final disposition of the matter."[128]

Regulation B also imposes a number of significant new data collection requirements on mortgage lending institutions regulated by all four Federal financial regulatory agencies. For example, Regulation B requires that, with respect to written applications for mortgage financing to acquire a one-to-four-family residence, creditors must request applicants to provide information as to their race or national origin, sex, marital status, and age. Applicants are to be informed that the information is requested "for the purpose of monitoring compliance with Federal anti-discrimination statutes" and that they are not required to provide it.[129] With these data any of the Federal financial regulatory agencies could make a prima facie determination as to

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[125] COC observed:

> At the outset we must recognize that the surveys were designed to provide the agencies with some initial experience in data collection, and the surveys were not intended to make a conclusion that particular banks were discriminating or for specific enforcement actions. Also, the surveys were conducted at a period of very low mortgage activity. For these reasons it is difficult to state that the surveys provided meaningful or useful data on the actual prevalence of discrimination, especially that each indicated deviant lending patterns. COC comments, p. 3.

[126] Board of Governors of the Federal Reserve System, "Fair Housing Survey" (Form B approach), May 2, 1975; Comptroller of the Currency, "Fair Housing Lending Practices Pilot Project, Survey C Approach" (July 14, 1975); and Federal Home Loan Bank Board, "Fair Housing Information Survey, Form A Approach" (Aug. 19, 1975).

[127] Thirteen State member banks participated in the Form B survey. FRB asserted that it "analyzed the statistical significance of the different rejection and approval rates for minority applicants as compared with all applicants or nonminority applicants in the several cases where such differences were revealed." Nov. 1977 Burns letter.

In response to plaintiff interrogatories in the National Urban League suit. FRB reported that based on its analysis of the data, examiners conducted further studies at two of the banks involved. Response to Plaintiff's Secondary Interrogatories No. 2, National Urban League, *et al.* v. OCC, *et al.* An examiner visited only one of the two banks. The plaintiff observed that, once at the institution, however, the examiner "reviewed no loan files or bank records." The plaintiff also noted that, relying solely on information contained in a letter from the institution, FRB concluded that no remedial action was necessary. With respect to the second institution, the plaintiff observed that some bank records were reviewed by an examiner although no visit of the bank was made; the examiner determined that there was no evidence in the records reviewed that disparate credit standards were being applied to minority applicants. The plaintiff again observed, however, that FRB did not indicate how thorough a record review had actually been conducted. For example, FRB did not state whether a review had been conducted to ensure that property appraisals were being made on a nondiscriminatory basis or that rejected minority applications had been compared with approved applications of whites. Memorandum in Support of Plaintiff's Motion for a Partial Summary Judgment filed in the National Urban League suit. As we noted earlier, the suit against FRB was dismissed without a decision on the merits due to the determination that the plaintiffs lacked standing to sue.

Analysis of the surveys which FHLBB and the COC conducted revealed similar problems in the scrutiny of potentially discriminatory trends. For example, although Form C revealed that some minorities were denied loans although they had the same level of creditworthiness as whites who received loans, COC concluded that discrimination could not be proven because of the low mortgage activity at the time the survey was conducted. Robert S. Warwick, Acting Director, Office of Housing and Urban Affairs, FHLBB, interview, Oct. 27, 1977, and Heimann letter.

With respect to these surveys, COC further stated:

> Nonetheless, we did subsequently conduct special fair housing examinations in two of the banks where the data did suggest possible deviations. One of these was conducted with representatives of the Department of Justice as observers. After thorough investigation no discriminatory lending practices were discovered in either bank. . . .It is also worth noting that since the 1974 survey, formal fair housing examinations and complaint handling procedures have been implemented. COC comments, p. 3.

FHLBB has also observed:

> The Bank Board did evaluate the meaning of the data to the extent possible, however, at the individual institution level, the only level effective for enforcement purposes, there was not sufficient data to so analyze. The Bank Board did investigate every example where the denial on any prohibited basis deviated from the norm. This investigative exercise by examiners was partly responsible for the development of the examiner training program which has since resulted in a significant number of violations being reported. FHLBB comments, p. 2.

[128] 42 Fed. Reg. 1242, 1261 (1977) (to be codified in 12 C.F.R. § 202.12(b)-(b)(3)).

[129] 42 Fed. Reg. 1242, 1261 (1977) (to be codified in 12 C.F.R. § 202.13.

whether a lender is discriminatorily denying mortgage loans to minorities or women, selectively imposing credit standards by race or sex, or imposing terms and conditions for minorities or women which differ from those for white males.

The data collection requirement in Regulation B applies to "the purchase of residential real property."[130] FRB's official staff interpretation makes clear that this requirement extends not only to mortgage financing but also to residential construction loans where such loan applications are part of or are in addition to an application for a "permanent mortgage loan."[131] Regulation B does not, however, extend its data collection requirements to applications for home improvement loans, as do the regulations of FHLBB and FDIC. Moreover, although Regulation B states that the data are to be used for monitoring compliance with ECOA and other fair housing laws, the regulation is silent on how this monitoring is to be conducted. For example, Regulation B does not provide for the routine submission of these data to Federal agencies or for periodic review. It does not describe the types of analyses which should be made for detecting ECOA violations.

FHLBB's Regulation

FHLBB's regulation[132] requires that all FHLBB-regulated lending institutions provide for specification of race, national origin, sex, marital status, and age on all housing-related loan applications, including those for construction and improvements. It also requires that lenders keep a "loan application register" so that examiners may readily identify and pull specific application files for review.[133] The regulation also requires that lenders visually observe and record the race and sex of applicants who refuse to provide the information.[134]

FDIC Regulation

The FDIC regulation[135] contains for FDIC-regulated lenders what are by far the most comprehensive and useful data collection provisions thus far proposed by any of the four financial regulatory agencies. Like the new FHLBB regulation, FDIC's regulation subjects all types of housing-related loans to its data collection requirements, requires the maintenance of loan application "log sheets" to be made available to FDIC examiners, and requires lender's designation of an applicant's race and sex if the applicant chooses not to provide this information.

FDIC's regulation is also strong in that it calls for data collection on the race, sex, and national origin of formal applicants, as well as for a notation as to the census tract of each piece of real property which is the subject of a credit transaction.[136]

One of the unique features of FDIC's regulation is this census notation requirement. By combining census tract data collection requirements with data on the race, sex, national origin, marital status, and age of borrowers, the regulation potentially enables FDIC to determine whether mortgage loans are being made to minorities outside all-minority areas and to whites outside all-white areas. Another unique feature of the regulation is its requirement for collection of credit information such as income, the characteristics of the property involved, and the nature of the loan sought in conjunction with race/ethnic and sex data of banks located within SMSAs and having assets exceeding $10 million.[137] Such information will make it possible for FDIC to determine whether credit standards are being ap-

[130] *Id.*
[131] See FRB "Staff Interpretation," EC-0005, Apr. 8, 1977.
[132] 43 Fed. Reg. 22,332 (1978).
[133] 43 Fed. Reg. 22,336, 22,337 (1978). Information to be collected on the register includes the race, sex, age, and marital status of the applicant as well as the census tract of the property. However, the register does not call for creditworthiness information; the most the register will reveal is the comparative rejection rates for minorities and nonminorities, female and males, single and married persons, applicants of various ages, and perhaps give an indication of redlined areas. It will not reveal disparities among various groups in the terms and conditions of loans or the reasons for rejection of applications.
[134] 43 Fed. Reg. 22,335 (1978). Such a provision, adopted permanently, would greatly enhance the use of data collection and maintenance. According to representatives of the financial regulatory agencies, applicants have often failed to supply such data, making it difficult to develop a "statistically significant" base from which to determine lending trends. Warwick interview, and John Shockey, Chief Counsel; Thomas P. Vartanian, Staff Attorney; Roberta Boylan, Assistant Director, Legal Advisory Services Division; Thomas W. Taylor, Associate Deputy Comptroller for Consumer Affairs and Electronic Funds Transfer System; and James T. Keefe, Special Assistant to the Comptroller; all of COC, interview, Nov. 3, 1977 (hereafter cited as Shockey and others interview). Lender designation of applicants' sex and race could help to remedy this problem. This temporary study is a part of FHLBB's settlement in the National Urban League suit.
[135] 43 Fed. Reg. 11,563–11,568 (1978) (to be codified in 12 C.F.R. § 338).
[136] 43 Fed. Reg. 11,563, 11,566 (1978) (to be codified in 12 C.F.R. § 338.4). The data collection requirements apply not only to persons who make written application, but to those who make "oral in-person" inquiries. 43 Fed. Reg. 11,564, 11,566 (1978) (to be codified in 12 C.F.R. §§ 338.1, 331.4). Thus, although the requirement should serve to reduce discriminatory prescreening of applicants, the exclusion of telephone inquiries erodes its overall effectiveness.
[137] 43 Fed. Reg. 11,566 (1978) (to be codified in 12 C.F.R. § 338.4). Although such banks represent only 30 percent of FDIC regulatees, they account for approximately 74 percent of FDIC-regulated mortgage activity. Gus Johnson, Chief Statistician, FDIC, telephone interview, Apr. 24, 1978.

plied in a nondiscriminatory fashion. The FDIC regulation, like the FHLBB regulation and Regulation B, requires lenders to retain their records for 25 months.

Regulation C

Regulation C,[138] issued pursuant to Home Mortgage Disclosure Act by FRB, is solely a data collection-related instrument. In essence, Regulation C requires certain lending institutions which make "federally related mortgage loans" to record, by census tract or zip code (where applicable), the total number and dollar value of mortgage loans on properties within each relevant SMSA each fiscal year.[139] The record retention period is 5 years.[140] If these records are used in conjunction with the data required by Regulation B and the proposed FHLBB regulation, it could enable the regulatory agencies to improve significantly their ability to identify patterns of discrimination.

3. Use

The data collection requirements discussed in the preceding section are, on the whole, quite comprehensive. The ultimate value of all such data, however, is dependent on the use to which it is put by the four financial regulatory agencies.

FHLBB and FDIC have agreed, by settlements in the *National Urban League* suit, to adopt and develop a national racial, ethnic, and sex data collection and analysis system.[141] COC, in its settlement of that case, also agreed to institute a data collection and analysis program,[142] but no plans have yet been developed. COC has indicated, however, that:

> a computer based data collection and analysis system which will be established in early 1979 will permit examiners to focus attention on those banks and particular loan files therein, where discriminatory patterns and practices are more likely to be found. . .Since our last communication we have hired a consultant who has developed a plan which we will be discussing with plaintiffs in the *National Urban League* suit in the very near future.[143]

FRB is the only one of the four regulatory agencies which has not acknowledged the need to collect and analyze data systematically.[144] Although the district court has dismissed the suit against FRB on procedural grounds, FRB notes that it is "considering, in connection with a comprehensive review of the Federal Reserve's consumer and civil rights enforcement program, ways in which monitoring information might be used more effectively by examiners."[145]

Although FHLBB and FDIC have agreed to institute a data collection and analysis system, it would appear that the use which the two agencies intend to make of data collected by their regulatees is not wholly satisfactory. The FDIC-proposed regulation indicated that data would be used to flag institutions for a more thorough review. FHLBB, in its March 22, 1977, agreement with plaintiffs in the *National Urban League* suit, gave similar indication:

> The Board. . .agrees that any [data collection and analysis] system devised by it. . .will be structured so as to enable the Board, at a minimum, to discover areas and institutions where deviant adverse action or rejection rates are occurring, to identify patterns of rejections and adverse actions that warrant further study, to flag individual institutions for indepth studies, and to measure changes in rejection or adverse action rates over time.[146]

[138] 12 C.F.R. § 203.

[139] 12 C.F.R. § 203.2(d). Regulation C extends to lending institutions covered by HMDA: a) with deposits which are federally insured, b) which make loans wholly or partially secured by a Federal agency, c) which sell mortgage loans to the Federal National Mortgage Corporation, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation.

[140] 12 C.F.R. § 203.5(a)(3). This period is to run from the end of the fiscal year upon which the data are based.

[141] The new project will differ from the one conducted by the agencies in 1974 in that it will show by individual institution, rather than by aggregate, lending practices over an ongoing period. The agencies consider that a major problem of the 1974 survey was that it was for a 6-month duration only, not long enough to establish trends. FHLBB, at least, intends to conduct the present study nationwide. It believes this will allow it to make regional comparisons as well as trace changing trends over time. Warwick interview. FHLBB added:

> The project will collect experimentally the long form of the Loan Application Register (approximately 48 columns) and from that longer Register extract two shorter ones to determine which is more useful for both examinations and data analysis. The major problem of the 1974 survey was not that the six month period was not long enough to establish trends but that the particular period was an unusually slow lending period and there were numerous problems in the design and collection of data itself. The present proposed study will be conducted using data from three SMSAs while examiners use the Loan Application Register in all savings and loans associations throughout the country and evaluate its usefulness as an examination tool. FHLBB comments, pp. 2, 3.

[142] National Urban League v. OCC, No. 76-0718 (D.D.C. Nov. 30, 1977) (Settlement agreement) pp. 3–5.

[143] COC comments, pp. 2 and 3.

[144] Roger Kuhn, Co-Director, Center for National Policy Review, interview, Oct. 13, 1977.

[145] FRB comments, p. 5.

[146] National Urban League v. FHLBB, No. 76-0718 (D.D.C. Mar. 22, 1977) (Settlement agreement).

While it is significant that FHLBB and FDIC will make use of the data in setting priorities for indepth investigation, their regulations should also make clear the lenders' responsibility for using the data to determine if their lending practices have an adverse impact upon minorities or women. If data indicate, for example, that minorities, women, or single persons have apparently been subjected to higher credit standards than whites, males, or married persons, or that nonvalidated credit standards have resulted in an unequal effect on protected classes,[147] the burden would shift to the creditor to show that discrimination has, in fact, not occurred[148] or to take affirmative action to correct the past discrimination and ensure against discriminatory practice in the future. Creditors who fail to take such corrective action voluntarily would be subjected to enforcement proceedings leading to the imposition of appropriate sanctions.

FHLBB regulations appear to permit, but not require, such use of data. FHLBB wrote to this Commission:

> The Bank Board intentionally incorporated the doctrine of discrimination in effect in both the regulations, Part 528, and the Guidelines, Part 531.8, to convey to member institutions the importance of their ability to meet their burden of proof.[149]

FDIC, however, has taken a different position. It wrote to the Commission:

> [The Commission's] view fails to recognize the purposes and advantages of the present bank examination framework. To shift the burden of proof to the creditor would require some form of legal or administrative proceeding. This is neither practical nor necessary with respect to the correction of most unsafe or unsound banking practices or violations of laws by regulated banks. It is expected that an examiner would conduct a thorough examination or investigation of a bank in which the collected data indicated possible discriminatory patterns. The examiner's report would provide a firmer basis for charging discriminatory practices, if such be found. Because of the many variables connected with credit evaluation, we do not believe that the data collection system, standing alone, will be capable of providing sufficiently substantial evidence to support a charge of discriminatory lending practices, except in the most flagrant cases.[150]

B. The Fair Housing Examination Process

1. Conduct of Examination

All of the financial regulatory agencies regularly examine the institutions they supervise. These examinations are the agencies' tool for ensuring that these institutions are in compliance with applicable laws.

Since 1974 the agencies have instituted consumer affairs examinations with fair housing components. FDIC's consumer affairs examination is conducted on a different schedule than its regular commercial examination.[151] This is true for some of FRB's and COC's regions as well. The remainder of the regions of the two agencies conduct the consumer affairs examination concurrently with the regular commercial examination.[152] FHLBB reviews compliance with fair housing statutes as a component of its regularized commercial examination of savings and loan institutions.[153]

FRB

FRB has examination responsibility for approximately 1,000 State member banks. Between April 1977, when FRB instituted its consumer affairs examination, and the end of 1977, approximately 500 State member banks had undergone FRB's fair housing examination. By March 31, 1978, FRB expects that roughly 85 to 90 percent of the 1,000 institutions will have received the special examination. Ultimately, all 1,000 institutions will undergo the examination on an annual basis.[154]

FDIC

By March 1978 approximately 50 percent of the 9,035 institutions which FDIC supervises were

[147] See discussion of the "effects test" definition of discrimination above.

[148] The principle that unexplained statistical disparities between protected classes and the majority may create a prima facie case of discrimination is well established in Federal case law. See International Brotherhood of Teamsters v. United States, 43 U.S. 324, 339 (1977); Kinsey v. First Reg. Securities, Inc., 577 F.2d 830, 839 (D.C. Cir. 1977); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970), accord, EEOC v. Local 14 Intl. Union of Operating Eng., 415 F. Supp. 1155, 1170 (S.D. N.Y. 1976).

[149] FHLBB comments, p. 3.

[150] FDIC comments, p. 3.

[151] Peter Kravitz, Attorney, Office of Bank Customer Affairs, FDIC, telephone interview, Mar. 31, 1978.

[152] Lynn Barr, Staff Attorney, Division of Consumer Affairs, FRB, telephone interview, Mar. 31, 1978, and William Resnik, Manager of Bank Compliance, Consumer Affairs Division, COC, telephone interview, Mar. 31, 1978. COC is moving toward concurrent examinations for all its regions.

[153] Lucy Griffin, Director, Consumer Affairs Unit, Office of Community Investment, FHLBB, telephone interview, Feb. 21, 1978.

[154] Rene Lacoste, Chief, Compliance Unit, Division of Consumer Affairs, FRB, telephone interview, Feb. 21, 1978. The special examinations have been stepped up in 1978 owing to an increase in regional personnel.

expected to have received the special consumer affairs examination review. The review was instituted June 1, 1977. Once all institutions have been reviewed, these fair housing reviews will continue on an ongoing basis.[155]

COC

COC has examination responsibility for the Nation's 4,658 national banks. As of December 1977, 3,196 of these institutions (about 69 percent) had received the special consumer affairs review. COC estimated that between 75 to 80 percent of all national banks had undergone the review as of March 1978. Once all institutions have been reviewed, these fair housing reviews will continue on an ongoing basis.[156]

FHLBB

FHLBB examines each of the roughly 4,100 savings and loan institutions which are members of the Federal Home Loan Bank System approximately once every 14 months. Since 1975 this examination has included a review of compliance with fair housing statutes.[157] Approximately 3,800 institutions had undergone examinations between that time and March 1978.[158]

2. Written Fair Housing Procedures

FRB examiners receive written instruction for the conduct of fair housing examinations from three separate documents: "Examiner Instructions,"[159] which applies to the review of compliance with all consumer statutes for which FRB is responsible; an "Examiner Checklist,"[160] which is a series of yes/no questions to be filled in by the examiners themselves during the consumer examination; and, finally, a set of procedures specific to fair housing entitled, "Fair Housing Examination."[161]

FDIC's written fair housing examiner procedures are contained in a memorandum to examiners and assistant examiners from the Director of FDIC's Division of Bank Supervision.[162] COC first issued its "Comptroller's Handbook for Consumer Examinations" in 1976, and has revised and updated it several times since.[163] FHLBB examiners utilize instructions which first became part of the FHLBB examiners' manual in 1975.[164]

3. Examinations and Analysis of Examiner Reports

FRB

Of the first 550 State member banks of the Federal Reserve System to receive the Board's new consumer examination, approximately 73 percent (401) were found to be in less than full compliance with Regulation B. FRB found that the majority of Regulation B violations related to the use of outdated credit applications and forms. Most other detected violations involved: (1) the unlawful request for the signature of a nonapplicant spouse, (2) the failure to fulfill the notification requirements of Regulation B,[165] or (3) the failure to adhere to the requirement to request information for monitoring purposes.[166]

Approximately 97 percent of the 550 banks examined were in violation of Title VIII in two technical areas. Some banks either had not provided the equal housing lending poster in the bank and its branches or had not included the equal housing lender logo[167] in advertisements. According to FRB, in each case in which violations were found, the bank promised correction. FRB also reported that

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[155] Pat White, Consumer Protection Analyst, Consumer Affairs Unit, Division of Bank Supervision, FDIC, telephone interview, Mar. 13, 1978.

[156] Royal B. Dunham, Jr., Manager, Examination Analysis, Consumer Affairs Division, COC, telephone interview, Mar. 13, 1978.

[157] FHLBB noted that:

> . . .the final class of examiner training in Fair Housing and Equal Credit, conducted during the winter and spring of 1976-77, was completed in early May. A number of times the Bank Board has referred to the examination cycle which has been completed since that last training course in May. This cycle used the same format which had already been in use for two years, and resulted in substantially more reported violations. FHLBB comments, p. 3.

[158] Griffin interview, Feb. 21, 1978, and Robert Moore, Deputy Director, Office of Examination and Supervision, FHLBB, telephone interview, Mar. 13, 1978.

[159] FRB "Examiner Instructions" (March 1977).

[160] FRB, "Examiner Checklist, Consumer Affairs Compliance Examination" (March 1977).

[161] FRB, "Fair Housing Examination" (Redraft, Oct. 29, 1976).

[162] John J. Early, Director, Division of Bank Supervision, FDIC, memorandum to Examiners and Assistant Examiners, "Fair Housing Compliance Report Form 6500/68," Aug. 29, 1977. FDIC's instructions to examiners with respect to the Home Mortgage Disclosure Act also appeared in memorandum form. John J. Early, Director, Division of Bank Supervision, FDIC, Memorandum to Examiners and Assistant Examiners, "Home Mortgage Disclosure Compliance Report Form 6500/69," June 1977.

[163] COC, "Comptroller's Handbook for Consumer Examinations" (1976).

[164] FHLBB, EOP-123, "Examiners Manual" (July 1, 1976). FHLBB also commented, "As the pertinent civil rights laws and regulations are revised, our examination procedures are revised just as the current Fair Housing portion is currently under revision to reflect changes in the new regulation." FHLBB comments, p. 3.

[165] Regulation B requires notification of adverse action. Fed. Reg. 1242, 1257-1260 (1977) (to be codified in 12 C.F.R. § 202.9). Regulation B also requires retention in records of specific reasons for adverse action taken on an application. 42 Fed. Reg. 1242, 1261 (1977) (to be codified in 12 C.F.R. § 202.12).

[166] Regulation B requires that such information be requested of applicants. 42 Fed. Reg. 1242, 1261 (1977) (to be codified in 12 C.F.R. § 202.13).

[167] The logo is a graphic depiction of a house accompanied by a bold typeface assertion that the institution is an "Equal Housing Lender" and does business "In Accordance With the Federal Fair Housing Law." See 12 C.F.R. § 528.5(b) (1977) for the logo.

no pattern of discrimination in real estate lending had been discovered by examiners.[168]

FRB made completed fair housing examiner reports of three institutions available to the Commission. The types of violations detected in these three cases, perhaps because of the use of the standardized forms with yes/no questions, tended to be the four most common violations found for all FRB-regulated institutions. FRB informed the Commission that each institution which was found to be in less than full compliance with fair housing requirements had promised correction. However, although the files indicate that FRB recommended that outdated forms requesting prohibited information be abolished, no remedies appear to have been proposed for the three other types of violations. Moreover, the three fair housing examination files do not include records of any remedial action which may have been initiated by the three institutions. Thus it was not possible for Commission staff to evaluate whether violations were adequately addressed.

FDIC

In response to a Commission request that FDIC provide the number of violations detected as a result of that agency's fair housing examinations, the FDIC reported merely that no "substantive" violations of Title VIII had been reported and that, "while it is not clear that the failure to collect monitoring information under Regulation B represents a fair housing problem or violation, this particular violation is noted with some frequency."[169]

FDIC did indicate that institutions frequently violated the agency's policy statement by failing to display the equal lending poster or by failing to give the required notice of nondiscrimination in advertisements for fair housing loans. The agency noted: "Moral suasion has generally been effective in bringing about correction in these areas." It also indicated that when it was discovered that an institution had failed to collect monitoring information required by Regulation B, the regional office staff "routinely" followed up to assure compliance.[170]

FDIC sent this Commission three examination files. As is the case with FRB, it appears from an analysis of these files that the use of reporting forms in fair housing examinations which require a yes or no response limits the type of fair housing findings made by FDIC examiners. One examination report revealed that an institution failed to collect racial and ethnic and sex data but was at the same time judged to have policies and procedures which were "nondiscriminatory with respect to the receipt, evaluation and subsequent action on mortgage and home improvement loan applications."[171] Such a determination has little meaning when made in the absence of relevant data.

The three fair housing examination files revealed the following four violations in one or more instances:

- Failure to display the equal lending poster.
- Failure of mortgage loan advertisements to contain required fair housing statement.
- Failure to notify applicants of adverse actions.
- Failure to request racial, ethnic, and sex data on housing loan application forms.

In all instances, the bank in question promised to correct the violations.

COC

COC indicated to this Commission that as of April 3, 1978, its examiners had, as a result of the agency's fair housing examinations, uncovered possible fair housing violations at only three institutions.[172] COC provided the Commission with the relevant examination report files. The three examination files indicate that examiners who conducted the fair housing reviews of the three institutions had good knowledge of fair housing requirements. However, a number of violations which were detected through the examination process did not appear to have been corrected.

COC noted:

> this fact should be placed in its proper perspective. In all cases discovered violations have been corrected prospectively. Correction of past violations will not be effected until Regulation B enforcement guidelines, currently out for public comment, have been adopted in final

[168] Rene W. Lacoste, Manager, Compliance Section, Division of Consumer Affairs, FRB, letter to Nancy Langworthy, Equal Opportunity Specialist, U.S. Commission on Civil Rights, Mar. 23, 1978.

[169] William A. Longbrake, Special Assistant to the Chairman, FDIC, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Mar. 28, 1978 (hereafter referred to as Mar. 28, 1978, Longbrake letter).

[170] Ibid.

[171] Exhibit E, attachment to Mar. 28, 1978, Longbrake letter.

[172] Thomas W. Taylor, Associate Deputy Comptroller, COC, letter to Cynthia N. Grasz, Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, Apr. 3, 1978.

> form. At that time all past violations will be addressed. We believe this to be preferable to requiring un-standardized corrective action while the issues are under further study.[173]

As a result, COC has taken no actions for the purpose of providing relief to victims of discriminatory practices it has uncovered. For example, in one case COC found that inquiries had been made on appraisal forms as to the racial and ethnic composition of the neighborhood where the loan was to be made. COC ordered a special examination, and, as a result, a new appraisal form was adopted by the institution. No action appears to have been taken, however, to rectify the discriminatory effect which the use of this form may have had prior to its discontinuation. In another case, evidence was uncovered that minority applicants had been rejected for loans without any apparent reason. Although the COC examiner brought these findings to the attention of bank management and, in fact, obtained an admission from the institution that the applicant had not received adequate consideration, no action appears to have been taken to provide relief to the past victims of this practice. Other violations and subsequent actions on the part of the institutions are included in exhibit 3.1.[174]

FHLBB

In calendar year 1977 FHLBB examiners detected 2,804 "possible or actual" fair housing violations as a result of the examination process.[175] In calendar year 1977, 1,849 supervisory letters advising FHLBB regulatees of "possible or actual" fair housing violations were sent, and 52 special examinations following up on possible violations were conducted for the same period.[176]

In the three examination reports FHLBB made available to this agency, examiners exhibited familiarity with fair housing requirements and conscientiousness in determining compliance with those requirements. Moreover, the examiners in some cases displayed persistence in seeking correction of violations. However, in the one case in which FHLBB found violations which remained uncorrected through three annual examinations, FHLBB could not obtain compliance through voluntary means. Nonetheless, FHLBB did not initiate formal enforcement proceedings against the institution. In that case, FHLBB examiners noted prescreening of applicants and lack of records on rejected applications in the 1975, 1976, and 1977 examinations of the institution. At the time of the 1977 examiner report, FHLBB had achieved no firm commitment from the institution that it would correct these violations.[177] A sample of other violations and the subsequent action is shown in exhibit 3.2.

It is not known whether FHLBB was successful in each attempt to correct violations at the two other institutions, since the records of the those examinations indicate that FHLBB was awaiting responses to supervisory letters. The records do indicate that FHLBB, as a matter of course, did look beyond the rationalizations and excuses offered by the institutions for "possible and actual" illegal practices. This compares favorably with the situation as it existed 4 years ago, when FHLBB and the other regulatory

[173] COC comments, p. 4.

[174] COC has supplemented the information contained in exhibit 3.1 as follows:

> We would like to apprise you of action which has occurred since February 1978. The first two violations occurred in one bank. A follow-up examination was conducted June 28, 1978. The prescreening violation cited in the examination report was predicated upon the fact that no declined applications were found in connection with a portfolio of loans generated by a broker. The report of examination did indicate that the bank was developing procedures to eliminate possible prescreening, but this was apparently not included in the material provided your office. The second examination did discover some rejected applications that had been overlooked at the first examination and, based on his review of the matter, the examiner concluded that no discriminatory practices existed. The problem with required spouse signature was not related to housing loans, but was included in the material forwarded to your staff on fair housing violations. During the examination the bank did commit to take prospective corrective action by revising its loan policy to comply with the signature provisions of Regulation B. COC comments, p. 6.

[175] Of the approximately 4,100 institutions to be examined, approximately 3,800 had undergone the fair housing examination between May 1977 and March 1978. This Commission does not know how many institutions had undergone the fair housing examination in calendar year 1977.

[176] Lucy Griffin, Office of Community Investment, FHLBB, letter to Roger Kuhn, Co-Director, Center for National Policy Review, Mar. 9, 1978 (hereafter cited as Griffin letter).

[177] Following the December 1975 examination, the institution promised in the future to notify rejected applicants of why they had been rejected. No monitoring of this promise was apparent from the records sent to this Commission. In the November 1976 examinaton, the examiner found that the paucity of records on loan rejections was in large part due to prescreening. The institution was informed that prescreening and the failure to notify prescreened applicants of adverse action was in violation of Regulation B. Subsequently, a supervisory letter was written to the institution directing it to: adopt formal loan application procedures which assure equal access to credit extensions to all qualified persons, document adequately reasons for denial of each rejected application, and develop an education procedures. implementation of the formal application procedures. The institution responded only with a promise to improve fair housing education of employees and to provide equal housing in lending logos in all loan advertising. In the December 1977 examination, the examiner observed, "Our review of association policies and practices indicates that essentially the same procedures as were evident at the previous examinations are used to screen potential applicants prior to completion of a written application." A supervisory letter directing correction was sent to the institution. Records indicate FHLBB was awaiting response. Francis M. Passarelli, Associate Director, Office of Examinations and Supervision, FHLBB, attachment to memorandum to Lucy Griffin, Office of Community Investment, FHLBB, Apr. 17, 1978 (hereafter referred to as Passarelli memorandum).

EXHIBIT 3.1

Fair Housing Deficiencies and Remedies in COC Examination Reports

Deficiencies	Remedy
– Prescreening in contravention of Regulation B.*	No remedial action was indicated.
– Requirement for spouse's signature in cases in which applicants applied for loans in their own names.	No remedial action was indicated.
– Failure to collect racial, ethnic, and sex data as required by Regulation B.**	Indication that a revised form providing for such information was being "contemplated" by the institution.
– Failure to include the equal housing lending logo in loan advertisements.	Agreement that the bank will include the logo.
– Possible discriminatory policy "which cannot be proved," the effect of which is to limit mortgage loans in the bank's predominantly black service area.	Special examination into the matter ordered. Among other actions the location of rejected and accepted loan applications were to be plotted on census tract maps, a review of bank policy to see whether it was discriminatory in effect was to be conducted, and a review of rejected and accepted loan applications by race was to be undertaken. The result of the special examination was not indicated in the records sent this Commission.

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* § 202.4(a) of Regulation B prohibits prescreening on a discriminatory basis. Prescreening is the discouragement of individuals from applying for loans before they actually fill out written applications. It is a practice specifically forbidden by FDIC's Title VIII/ECOA regulation and by FHLBB's proposed regulation as well as by Regulation B.

** § 202.13(a) of Regulation B proscribes that lending institutions request such information on loan applications.

Source: Thomas W. Taylor, Associate Deputy Comptroller, COC, attachment to letter to Nancy Langworthy, equal opportunity specialist, U.S. Commission on Civil Rights, Feb. 28, 1978.

EXHIBIT 3.2

Fair Housing Deficiencies and Remedies in FHLBB Examination Reports

Deficiencies	Remedy
– Failure to maintain records used in arriving at decision to deny loan applications.	Savings and loan institution provided FHLBB with a written assurance that it would, in the future, maintain adequate records of "all reasons for actions taken in connection with each loan application."
– Use of sex and marital status—descriptive terms on loan applications in violation of Regulation B.	Existing forms corrected manually to conform to the requirements of Regulation B and a new stock of applications ordered which conformed to the requirements of Regulation B.
– Ethnic composition and/or geographic location appears to have been used as a loan underwriting standard.	FHLBB notified institution that it was intending to conduct a special review into the matter. The institution responded with an explanation of the alleged activities which FHLBB said was unacceptable. A special investigation was then conducted in which FHLBB determined that the institution was taking corrective action because of the number of loans originating in the previously redlined areas increased substantially.

Source: Francis M. Passarelli, Associate Director, Office of Examinations and Supervision, FHLBB, attachment to memorandum to Lucy Griffin, Office of Community Investment, FHLBB, Apr. 17, 1978.

agencies often relied solely on the justifications supplied by banks for suspect practices uncovered in the examination process.[178]

4. Examiner Training

Since 1974 the fair housing training of examiners at the agencies has improved. Most of this improvement was initiated independently by the agencies. There has, in addition, been some external impetus for improved training. For example, the *National Urban League* suit settlements entered into by FHLBB, FDIC, and COC required better training programs.[179] The Department of Justice and HUD, in testimony before the Senate Committee on Banking, Housing, and Urban Affairs during hearings on the fair housing practices of the agencies, urged improved training of examiners. The Committee issued a report pursuant to the hearings which included improved examiner training in its list of recommendations for the four agencies.[180] In addition, pursuant to the recommendation of the Assistant Attorney General for Civil Rights, an interagency task force on fair housing was created, in part to improve fair housing training of examiners and develop joint agency examination procedures.[181] The task force used a training program which FHLBB had developed independently as a model for the agencies.

In addition, as of late 1977, two training sessions had been held by the interagency consumer affairs training schools. These sessions, conducted by staff of FRB, COC, and FDIC, provided an overview of the requirements of the fair housing laws. Another 2-week interagency session was planned for spring 1978.[182]

FRB

FRB conducts 2-week consumer affairs training on a regular basis as part of a new consumer affairs education program. Three and a half days of class time are devoted to lectures, case studies, and examination procedures relating to ECOA, HMDA, and Title VIII. A representative of the Civil Rights Divison, Department of Justice, takes part in the civil rights training. Approximately 200 FRB examiners and other professional staff participated in five sessions held between August 1976 and November 1977. In addition to the consumer affairs training, instruction on civil rights laws continues to be included in the curriculum of the senior examiner and assistant examiner schools.[183]

FDIC

FDIC's fair housing training, which was instituted in October 1976, consists of lectures and seminars on "legal, theory and policy matters" pertaining to Title VIII, ECOA, and HMDA.[184] By the end of 1977, nearly 400 of FDIC's roughly 2,000 examiners had received fair housing training.[185] FDIC also presented a 1-week fair housing workshop in May 1977, in which 44 staff members participated. At this workshop, speakers included representatives from DOJ and FHLBB and covered such topics as: FDIC fair housing responsibilities, applicable legislation, redlining, patterns of discrimination, procedures for investigating and resolving complaints, examination procedures, recordkeeping requirements, use of sampling techniques in investigation, evidence of noncompliance, and compliance report preparation. Participants included examiners and other regional office staff.[186]

FDIC will continue its fair housing training of examiners through 1978. All examiners are scheduled to receive the training. Regional offices are also holding workshops to train examiners in consumer protection laws, including fair housing.

COC

As of November 1977, approximately 400 of COC's 2,523 examiners had attended COC's 2-week training in consumer laws and examination procedures. Approximately one-third of the instruction is

[178] See *To Provide. . .For Fair Housing*, pp. 178–80.

[179] National Urban League v. FHLBB No. 76-0718 (D.D.C. Mar. 22, 1977) (Settlement agreement), pp. 5–6; National Urban League v. FDIC No. 76-0718 (D.D.C. May 13, 1977), (Settlement agreement), pp. 3–4; and National Urban League v. OCC No. 76-0718 (D.D.C. Nov. 30, 1977) (Settlement agreement), pp. 3–5. As of July 1978 FRB had not settled in this case.

[180] U.S., Congress, Senate Committee on Banking, Housing, and Urban Affairs, *Report on Fair Lending Enforcement by the Four Federal Financial Regulatory Agencies*, 94th Cong. 2d sess., June 3, 1976.

[181] Pottinger statement.

[182] Shockey and others interview.

[183] Arthur Burns, Chairman, Board of Governors of the Federal Reserve System, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Nov. 7, 1977.

[184] William A. Longbrake, Special Assistant to the Chairman, FDIC, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Nov. 4, 1977 (hereafter referred to as Nov. 4, 1977, Longbrake letter). Attachment, Exhibit IV, "FDIC's Fair Housing Training for Examiners." FDIC has separate examiner training sessions for "newly hired" assistant examiners, assistant examiners with from 1 to 2 years of field examination experience, and assistant examiners with 21/2 or more years of field examination experience. Each of these groups receives fair housing training.

[185] Carolyn Aldrich, Consumer Affairs Specialist, Office of Consumer Affairs and Civil Rights, FDIC, telephone interview, Mar. 28, 1978. For fiscal year 1978, 2,006 examiner positions were allocated to FDIC. Not all those positions have been filled. Ibid.

[186] Attachment, Exhibit IV, to Nov. 4, 1977, Longbrake letter.

devoted to fair housing, including the Equal Credit Opportunity Act and the Home Mortgage Disclosure Act. Case studies are used to teach detection of discriminatory devices and evaluation of potentially discriminatory practices. Lectures are presented by DOJ and FRB staff. COC intends to train all national bank examiners in the fair housing procedures.[187]

In 1976 staff of the Housing Section, Civil Rights Division, DOJ, accompanied COC examiners on their consumer affairs examination of six national banks. This was the result of COC's acceptance of an invitation by DOJ to the four agencies for the purpose of providing them with advice on how to improve their fair housing examination programs. COC was the only one of the four agencies to accept DOJ's offer. Following these joint examinations, DOJ staff made a number of recommendations to COC.[188]

FHLBB

Between fall 1976 and spring 1977, FHLBB conducted extensive training in nondiscrimination enforcement for its examining staff of 746. This program provided 2 1/2 days of training for every FHLBB examiner. Lectures were given on applicable laws and regulations, investigation techniques, and enforcement mechanisms. These training sessions made use of case studies and loan files.[189]

The examiners are trained to look for practices which may be discriminatory in effect as well as for deliberate discrimination. Examiners are also instructed to utilize census tract maps to determine where loans have been granted, rejected, and "made on less favorable terms than requested" to determine whether redlining is taking place.[190]

FHLBB has provided similar programs for regional supervisory agents, who review examiner reports and often contact institutions when problems have been detected. In addition, a special 1-day nondiscrimination course was presented to the 12 Federal Home Loan Bank presidents in July 1977.[191]

[187] Heimann letter.

[188] Among DOJ's recommendations were that COC expand the sample of applications it reviewed for compliance with fair housing laws so as to represent adequately minority and female applications; that loan officers provide, where possible, racial/ethnic and sex data not provided by the applicant; and that COC examiners review an institution's employment policies to ensure that discriminatory employment practices were not affecting services to minorities and women. Walter Gorman, Acting Deputy Chief, Housing Section, Civil Rights Division, DOJ, interview, Nov. 14, 1977. COC has noted that "a major purpose of the planned data collection and analysis system, as noted previously, is to permit examiners to more effectively select a housing sample from the loan files." COC comments, p. 6.

[189] Robert S. Warwick, Acting Director, Office of Housing and Urban Affairs, FHLBB, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Nov. 4, 1977 (hereafter cited as Warwick letter).

[190] FHLBB, "Nondiscrimination in Lending and Employment: A Handbook on Civil Rights Laws and Enforcement" (September 1977).

[191] Warwick letter.

[192] 12 C.F.R. § 277 (1977).

[193] 12 C.F.R. § 277.2(b) (1977).

[194] FRB comments, p. 5.

C. Complaint Procedures

1. FRB

FRB has a regulation pertaining to consumer complaints in general, but does not have separate instructions for handling fair housing complaints. The consumer complaint regulation, commonly referred to as Regulation AA,[192] states where and how complaints are to be filed. It sets forth the period within which FRB or Reserve Bank staff should respond to a complainant:

> Within 15 business days of receipt of a written complaint by the Board or a Federal Reserve Bank, a substantive response or an acknowledgement setting a reasonable time for a substantive response will be sent to the individual making the complaint.[193]

But the regulation is silent on how long a "reasonable time" may be and fails to set requirements for the investigation or disposition of complaints.

FRB notes that:

> Under present procedures, Reserve Banks operate under general instructions regarding the investigation and handling of consumer complaints. FRB staff is in the process of issuing, as part of FRB's expanded compliance and enforcement program, comprehensive and detailed instructions regarding investigation procedures.[194]

Complaints are investigated by examiners at the 12 Federal Reserve Banks. If they are initially lodged with the Federal Reserve Board in Washington, D.C., they are forwarded to the appropriate Federal Reserve Bank for action. The Reserve Banks, in turn, send status reports of complaint investigations to the Consumer Affairs Division at FRB. Those reports include the bases on which the complainant is alleging a violation (for example, marital status or sex) a very brief account of the complaint, and the explanation of the respondent institution.

The reports do not contain a description of the investigation or an explanation of the decisions. This

is especially unfortunate because FRB stores the information from these reports on computer[195] and thus has the potential for doing a number of statistical analyses of the complaints it receives. If the reports were expanded, FRB would be able to monitor the adequacy of FRB complaint resolutions more closely.[196]

2. FDIC

Prior to 1976, FDIC had no written fair housing complaint procedures. In fall 1976, FDIC adopted "Procedures for Investigating Fair Housing Complaints," which are applicable to complaints filed pursuant to Title VIII, ECOA, and HMDA.[197]

The procedures, which were adapted from guidelines prepared by DOJ, are comprehensive and provide excellent instructions for examiner investigation of complaints. They state that the purpose of the fair housing complaint investigation is not only to determine the validity of the individual complaint, but also to "document the practice or act that caused the complaint, and determine whether the practice or act represented an isolated case or a general policy that must be corrected."

The investigative procedures direct the examiner to interview the complainant following review of the written complaint and to visit the respondent institution. While there, the examiner is to determine the institution's general loan policies; application procedures; underwriting policies, including credit scoring devices; lending patterns, by examining the locations in which loans have been made by census tract or zip code; [198] and "a representative sample of accepted and rejected mortgage applications for the period of time during which the complainant's application was submitted." The examiner is instructed to review appraisal forms, worksheets, and "any documents that list the amount of the loan made, interest rate, duration, points and date of approval" of those applications.[199] Examiners are also instructed to contact appraisers and real estate brokers who had conducted business with the respondent institution at the time of the complainant's application to determine whether the institution had reflected any discriminatory policies or practices of appraisers or real estate brokers.[200]

The regional office, after determining if the complaint is valid, forwards the complaint and an explanation of the determination to the Washington office.[201]

3. COC

COC has written procedures for processing Title VIII complaints,[202] but as of March 1978, it had not developed such procedures for ECOA complaints and, indeed, had not allocated the resources for proper handling of ECOA complaints.[203] Although all fair housing complaints are ultimately reviewed in Washington, they may be received, initially reviewed, and investigated by the regional offices prior to submission to the Washington Office for final review.[204]

The procedures direct that the respondent institution be notified of the complaint and be given 10 days to respond to the charges. Following that, the complainant is to be interviewed and the complainant's and institution's accounts compared. Subsequently, bank personnel who were involved in the activities recounted in the complaint are to be interviewed at the institution. While at the institution, the examiner is to assess: 1) the bank's explanation for the incident, including the reasons

[195] FRB, Consumer Complaint Control Procedures (Jan 1, 1977).
[196] Rene Lacoste, Chief, Compliance Section, Consumer Affairs Divison, FRB, telephone interview, Feb. 24, 1978.
[197] FDIC, "Procedures for Investigation of Fair Housing Compliants" (undated). In October 1976 FDIC issued additional written instructions for the handling of Title VIII complaints. See also memorandum from John J. Early, Director, Division of Bank Supervision, FDIC, "Procedures for Processing Complaints Under Title VIII, Civil Rights Act of 1968," on a standardized investigation reporting form Memo. No. R/D-101-76, Oct. 22, 1976.
[198] Ibid., pp. 7-12.
[199] Ibid., p. 13.
[200] Ibid., pp. 15, 17.
[201] Nov. 4, 1977, Longbrake letter.
[202] COC, "Procedures for Processing Complaints Involving Title VIII (Fair Housing) of the Civil Rights Act of 1968 (42 U.S.C. 3605)," Examining Circular No. 158, to all Regional Administrators and Examining Personnel, Aug. 8, 1977.
[203] COC stated:

> We simply do not have the resources to do a field investigation of all ECOA complaints, as we do for fair housing complaints, although we do seek to resolve all complaints. If we cannot adequately respond to the complainant on the basis of his/her letter, we correspond with the bank to receive its explanation of the situation and then make a determination based on the facts presented by both parties. We are considering modifying this procedure in order that we may have more information upon which to make such determinations. First, we would have examiners conduct a follow-up review of all complaints and their resolution at the next subsequent consumer examination. For instance, this should enable the examiner to determine if credit was denied on a prohibited basis because a lending officer was not adhering to bank policies. Second, in connection with ECOA complaints we may ask the bank for more documentation and an explanation of its lending policy concerning the type of loan associated with the denied credit. We are confident that our present procedures are reasonable, but at the same time we realize the state of the art is still evolving and our procedures are not static. COC comments, p. 4.

[204] COC, "Procedures for Processing Complaints Involving Title VIII (Fair Housing) of the Civil Rights Act of 1968 (42 U.S.C. 3605)" Examing Circular No. 158, to all Regional Administrators and Examining Personnel, Aug. 8, 1977.

for denial of the loan or for the imposition of particular terms and conditions on the loan; 2) the bank's policy with regard to the making of loans, "including all factors taken into account in determining whether a given applicant is eligible for a loan or other financial assistance, including consideration of the neighborhood"; 3) whether any of those factors take into account "directly or indirectly, the applicant's race, color, religion, national origin, sex, or marital status"; and 4) the number of loans to applicants who are of the same race, color, religion, national origin, sex, or marital status as the complainant, and the time the loans were made.

The examiner is also to "review the name and residence of persons receiving such loans to determine whether the bank may have a policy of granting such loans only in certain neighborhoods." In determining the bank's policy, the examiner is to obtain copies of any available writings or documents pertaining to the bank's standards for making loans, and, in order to verify the lender's policy, other mortgage applications (both accepted and rejected) are to be reviewed. If the respondent institution has undergone a consumer examination, which would include an examination of fair housing compliance, the examiner is also to review the examination reports.

Within 10 business days of the conclusion of the investigation, the examiner is to submit a report to the Regional Administrator containing the examiner's recommendation for a decision. Within an additional 10 business days, the Regional Administrator is to review and comment upon the report and forward it to headquarters in Washington. Within 30 days, if the Regional Administrator and Washington staff approve the examiner's recommendation, the Washington staff is to inform the complainant and respondent institution of the decision.[205] COC is the only one of the four agencies to impose time limitations on complaint resolution.

4. FHLBB

FHLBB's written instructions for handling fair housing complaints have been combined with its procedures for handling consumer complaints.[206] FHLBB procedures call only for filing and processing complaints; they do not include instructions for actual complaint investigation. As with the banking regulatory agencies, all complaints, whether received in Washington or the regional offices, are to be investigated by regional personnel. As is also true for the other three agencies, FHLBB's regional personnel are to file status reports of the complaints with Washington.

The Washington office codes all complaints according to a number of facts, including the status of their disposition, the basis of the alleged violation, and the nature of their resolution. FHLBB has maintained these records of complaints against the saving and loan institutions it supervises only since July 1, 1977, when its new complaint procedures became effective.

2. Complaint Receipt and Handling

Complaint Statistics

Since the promulgation of Regulation AA[207] in 1976 and through March 1978, FRB recorded the receipt of only two fair housing complaints.[208] Both were designated Title VIII complaints by FRB staff and neither was deemed legitimate by the Reserve Banks which investigated them.[209]

FRB may have received additional complaints alleging discrimination in mortgage finance as well, if these complaints specifically alleged ECOA and not Title VIII violations. As FRB wrote to this Commission:

> An explanation for the small number of complaints categorized as fair housing complaints is that consumer complaints alleging unlawful discrimination and citing ECOA and Regulation B have routinely been categorized as ECOA and not as Fair Housing Act violations. FRB is in the process, however, of changing its

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[205] Ibid., pp. 4–5. The time limitation imposed on the various stages of complaint processing may be extended if deemed necessary by the regional office. Ibid., p. 1. The Consumer Affairs Division is the Washington office dealing with fair housing compliance.

[206] William Sprague, Director, Office of Examinations and Supervision, FHLBB, memorandum to Supervisory Agents and District Directors, "Procedures for Handling Consumer and Nondiscrimination Complaints," Memo. No. SP–12, June 28, 1977.

[207] Regulation AA (12 C.F.R. § 227(1977)) is discussed above.

[208] One complaint was lodged in August 1977 and the second was lodged in January 1978. FRB's equal housing lender poster, which State-chartered member banks are required to display in their lobbies, refers complainants who wish to allege discrimination under Title VIII to HUD. It refers those wishing to allege discrimination under ECOA to its own Division of Consumer Affairs.

[209] Rene W. Lacoste, Manager, Compliance Section, Consumer Affairs Division, FRB, letter to Nancy Langworthy, Equal Opportunity Specialist, U.S. Commission on Civil Rights, Mar. 23, 1978; and Allen L. Raiken, Acting General Counsel, FRB, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Apr. 7, 1978. Prior to 1976, the Federal Reserve Banks, which process fair housing complaints for the Board, were not required to report the number of complaints they had received or the results of their complaint investigations to the Board.

consumer complaint recording procedures; as part of this process, fair housing complaints will be more specifically encoded.[210]

FDIC has fair housing complaint records from 1975. As of March 1978, FDIC had recorded 67 such complaints.[211] In none of its complaint investigations did FDIC conclusively determine that discrimination had occurred.[212]

COC has no record of having received a fair housing complaint prior to 1975. As of January 1978, it had received 43 fair housing complaints.[213] COC asserted that none of the complaints was a violation of law.[214]

FHLBB has records of fair housing complaints as of July 1977 when it instituted its new complaint handling procedures. As of March 31, 1978, it had received 86 complaints alleging sex, marital status, race/national origin, or religious discrimination in credit transactions.[215] Of these, FHLBB is unable to provide the precise number of complaints involving mortgage lending, but the Director of the Consumer Division, Office of Community Investment, FHLBB, estimates that "only two or three" allege discrimination in other types of credit transactions.[216]

Observations

The four regulatory agencies provided the Commission with a total of 12 complaint files. While it is obviously not possible to draw definitive conclusions about each agency's complaint handling based on such a small sample, the Commission's review did note certain significant elements, some negative and some positive.

Among the positive features identified with respect to some of the complaint investigations in the sample were:

- Interviewing was thorough.[217]
- Time limitations were imposed.[218]
- Pattern and practice reviews were ordered.[219]

[210] FRB comments, p. 5.

[211] Of these, 6 were received in 1975, 21 in 1976, 36 in 1977, and 4 in 1978.

[212] The status of the FDIC complaints is as follows:

7 complaints—"Advertising corrected"; 4 complaints—"Possible discrimination–consumer advised of rights";1 complaint—"No proof of discrimination–consumer dropped complaint"; 44 complaints—"No evidence of discrimination"; 2 complaints—"Complaint rescinded"; 2 complaints—"No discrimination–possible Reg. B. violation"; 1 complaint—"referred to correct enforcement agency."

Two of the complaints lodged in 1977 and four lodged in 1978 have not yet been closed. Mar. 28, 1978, Longbrake letter. A review of complaint files sent to this Commission by FDIC indicates that when "possible discrimination" was detected in a complaint investigation, FDIC actively sought corrective action, which included requiring banks which had failed to fulfill the fair housing advertising requirements to do so and monitoring the banks to assure compliance; requiring banks which had discriminated on the basis of sex in regard to mortgage loans to revise their policies and practices to conform to the requirements of Regulation B and following up this action with an onsite review within 30 days to ascertain compliance. For relief, the complainant was referred to HUD or advised to seek an attorney.

[213] Of the 43 complaints received, 3 were received in 1975, 16 in 1976, and 24 in 1977. Mar. 28, 1978 Longbrake letter.

[214] Thomas W. Taylor, Associate Deputy Comptroller, COC, letter to Nancy Langworthy, Equal Opportunity Specialist, U.S. Commission on Civil Rights, Feb. 23, 1978. The investigation of the 43 complaints resulted in the following dispositions:

16 complaints—COC determined that the bank was legally correct; 16 complaints—COC determined that there were no violations of law, but directed the banks to respond to information requests from complainants who questioned specific practices; 3 complaints—COC found bank errors which it determined were "not violations of the Fair Housing Acts"; 1 complaint—the parties involved settled the case by mutual agreement–COC found "no violation"; 1 complaint—COC stated that the bank determined that it was not necessary to respond to the complainant since the complaint "was for information only"; 3 complaints—COC determined that there had been a "factual dispute" and the complainant was referred to an attorney; 3 complaints—COC had not resolved these complaints as of January 28, 1978.

COC stated further:

. . .we realize detection of discrimination is difficult because most forms of prohibited discrimination are very subtle rather than overt. Experience will increase our ability to discover prohibited patterns and practices. COC comments, p. 5.

[215] Sixty-nine of the complaints were received in 1977 and 17 were received in 1978.

[216] Lucy Griffin, Director, Consumer Affairs Division, Office of Community Investment, FHLBB, telephone interview, Apr. 25, 1978. Twenty-three of the complaints alleged discrimination based on race or national origin; 13 complaints alleged sex discrimination; 3 complaints alleged discrimination based on race or national origin and sex; 5 complaints alleged discrimination based on marital status; 10 alleged discrimination based on sex and marital status; 1 complaint alleged discrimination based on marital status and religion; 28 complaints alleged redlining; 1 complaint alleged redlining and discrimination based on race or national origin; 1 complaint alleged redlining and discrimination based on sex and marital status; and 1 complaint alleged redlining and discrimination in the appraisal of property.

Disposition of the complaints is as follows:

42 complaints—"Association Position Substantiated—No Supervisory Action Indicated"; 2 complaints—Interpretive Dispute–Referred Complainant to Attorney or Suggested Alternative Course of Redress"; 1 complaint—"No Reply Necessary–To Files"; 1 complaint—"Referred to Other Responsible Party for Handling and Response"; 1 complaint—"Association Position Substantiated–No Supervisory Action Indicated/Communication Problem/Misunderstanding–Action Taken to Resolve"; 25 complaints—Open (Unresolved); 12 complaints—"Other."

Seven of the unresolved complaints were lodged in August 1977 but had not been resolved as of Mar. 31, 1978. Each of these complaints alleged redlining. Ibid.

[217] FDIC examiners tended to interview all persons who were connected with the complaints. For example, in a complaint in which the appraisal value was deemed too low to make the loan, the investigator interviewed the complainant, the bank management, the loan officer, the bank's appraiser, the owner of the property, the listing broker, and the real estate broker. The examiner also attempted to interview neighbors who allegedly did not want blacks moving into the all-white neighborhood and who allegedly had put pressure on the seller not to sell to the complainant.

[218] Time limitations were imposed at various stages by FDIC and COC. In an FDIC complaint in which that agency determined that the respondent appeared to have violated Title VIII, FDIC informed the respondent that it expected specific corrective action and that an examiner would be sent "to review progress" in those areas within 30 days. COC gave a respondent bank 10 days in which to answer complaint charges.

[219] An FDIC review of policy statements and blank application forms led to a finding by FDIC that information had been illegally requested. FDIC

• Rejected and accepted applications were noted on census tract maps.[220]

• Correction of "technical violations" was sought.[221]

On the negative side, the complaint file samples as a whole indicated a tendency by agency complaint investigators to conduct insufficient investigation into the underlying issue of creditworthiness. An analysis of the sample complaint files revealed the following shortcomings with respect to investigation and resolution:

• Insufficient attempts were made to validate the objectivity of appraisals which were used as the basis for loan denial.[222]

• Complainants were not interviewed or contacted for further information.[223]

• Not all allegations in the complaint were investigated.[224]

COC indicates that its procedures for investigating complaints have been improved:

> In August 1977 we issued Examining Circular No. 158, discussed elsewhere in the draft report, which clearly stated investigative procedures to be followed in order to remedy the problems referred to in footnote 206. Moreover, we have taken stronger measures involving appraisals. For example, since that time we have investigated one situation where the appraisal was inadequate and we required the bank to have a new appraisal made by an independent appraiser who was acceptable to us.[225]

D. Remedial Activity

The four Federal financial regulatory agencies have two principal means of addressing violations of fair housing law. They may utilize administrative sanctions[226] or they may refer violations to the Department of Justice.[227]

The complete absence of formal legal proceedings by the regulatory agencies was noted by the Senate Committee on Banking, Housing, and Urban Affairs following its March 1976 hearing on the fair lending enforcement efforts of the four agencies. Among the Committee's findings were:

• No agency, including the Bank Board, has ever made a formal finding of discrimination in an institution it supervises despite evidence that discrimination is widespread. No agency has issued a cease and desist order or other form of sanction against an offending lender.

• No agency has referred cases to the Department of Justice.

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then directed the examiner in charge of the complaint investigation to review all applications of minority groups persons who might possibly have been adversely affected by the policy and forms used by the bank.

[220] FDIC and COC did this in one out of three of the complaint investigations which each sent the Commission. The significance of plotting on census tract maps is discussed in section III.

[221] The agencies view some fair housing problems of the institutions they supervise as "technical violations." Examples of these have been failure to notify an applicant of adverse action as required by Regulation B, failure to note the reason or reasons for adverse action in institution records (also required by Regulation B), and failure to display the fair housing logo. Correction of technical violations were sought by FDIC, COC, and FHLBB with respect to a number of the complaints they forwarded to the Commission.

[222] One FDIC complaint and one COC complaint alleged that lending institutions rejected loan applications because the appraised value of the properties sought did not equal the selling price. In both cases, the appraisers were employed by the respondent banks. In the COC complaint, the bank's appraisal was merely $2,000 less than the selling price and a real estate agent whose services were used by the complainant stated, in contrast to the bank's appraiser, that the selling price was "a very good offer" for the property in question. The complaint investigator did not thoroughly investigate either the possibility that the appraisal itself was discriminatory or that the required appraisal-to-selling price ratio was higher than institution policy required. In the FDIC complaint, the lower appraisal was based on "functional obsolescence" of the property. Commendably, the complaint investigator plotted the location of applications rejected on the basis of "functional obsolescence" on census tract maps. However, despite the examiner's finding that all applications which had been rejected on this basis appeared in "racially mixed" neighborhoods and his observation that the respondent's appraisal forms called for notation of "stable" or "changing" neighborhoods, which he interpreted as referring to the racial makeup of the neighborhood, the complaint was found invalid. There was no indication that the examiner reviewed the appraisal-to-selling price ratio of loans to whites in white neighborhoods to see whether there were large discrepancies between the asking prices and the appraisals.

[223] This was the case in 5 of the 12 complaints: 2 FRB complaints, 2 COC complaints, and 1 FHLBB complaint. In these cases, complainants were not contacted until determinations with respect to the complaints were reached. Moreover, explanations of the respondent institution were patently accepted without further investigation. For example, in response to four complainants' allegations, the respondent institutions stated that internal policies prevented them from making the loans. Neither the policies themselves nor their potentially discriminatory effect was questioned by the agencies. The respondent institutions were not visited and thus no review of written policies or loan files was conducted.

[224] In the case of a complaint lodged against an FHLBB-supervised savings and loan institution, FHLBB made a determination of absence of discrimination based on a review of only one allegation contained in the complaint. The complainant alleged that he had been denied loans for three properties in three different neighborhoods and charged that these neighborhoods had been redlined by the respondent institution. Based on the discovery that seven loans had been made by the respondent institution in one of the three neighborhoods, FHLBB upheld the institution's denial of discriminatory action. This occurred despite the investigator's observation that the bank had no record of written applications in the other two neighborhoods "for the past two years," and that there was reason to believe that the institution did not keep accurate records of rejected applications.

[225] COC comments, p. 5.

[226] The sanctions which are available to the agencies include cease and desist authority, termination of charters, termination of insurance, removal of directors and/or officers, and suspension from the use of credit facilities provided by the Government. 12 U.S.C. § 1426(i), 1437, 1464(d), 1730, 1818 (1976).

[227] Referral of violations of Title VIII of the Civil Rights Act of 1968, although not specifically provided for in that act, is an option open to the agencies and would be consonant with DOJ's authority to bring pattern and practice suits independently (42 U.S.C. § 3613 (1970)). ECOA specifically provides for referrals to DOJ (15 U.S.C. § 1691e(g) (1976))).

• No agency has ever required a lender to adopt an affirmative program to redress a past pattern of discrimination.[228]

Through February 1978, none of these devices had ever been invoked because none of the regulatory agencies had ever made a formal finding of a fair housing violation.[229] Since that time, however, FHLBB has engaged in some enforcement activity. In August 1978, FHLBB wrote to this Commission:

> The Federal Home Loan Bank Board made a number of findings of discrimination and [has taken] appropriate supervisory action. At this time, the Agency has issued a cease and desist order against one association for failure to lend in an urban area. . . .The Bank Board has on several occasions required a lender to adopt an affirmative action program and reverse a prior practice of discrimination, even though the actual dispute was voluntarily resolved by the lender and the complainants.[230]

All four regulatory agencies, along with the National Credit Union Administration, have recently issued proposed uniform guidelines for administrative enforcement of Regulation B, the Equal Credit Opportunity Act, and the Fair Housing Act.[231] The proposed guidelines indicate what type of corrective action creditors will be required to take when certain kinds of substantive violations are uncovered by the agencies. The enumerated violations include: prescreening of credit applicants, use of discriminatory criteria in determining creditworthiness, imposition of unequal terms and conditions in making loans, and failure to collect monitoring information required by Regulation B. The enumerated remedies include: affirmative advertising directed at "the discouraged class," when evidence of prescreening has been discovered; soliciting new applications from former applicants, who may have been subjected to discriminatory credit evaluations; reimbursement of fees paid previously by applicants found to have been discriminatorily rejected; and soliciting Regulation B-required monitoring data for applications submitted since the effective date of Regulation B, if an institution had previously failed to collect such data.

The proposed guidelines, therefore, constitute a positive step in the direction of more aggressive regulatory agency enforcement. However, as is true of the agencies' fair housing regulations, the guidelines do not outline uniform enforcement procedures, such as time frames, for compliance activity or provision for reviewing, as part of the examination process, data on race, ethnicity, sex, marital status, and age to identify possible discriminatory practices.

IV. Organization and Staffing

Since 1977 assignment of fair housing responsibilities within the agencies has been in a state of flux. With respect to FHLBB, FDIC, and COC, a major factor in the reorganization of fair housing responsibilities has been the *National Urban League* suit and the plaintiffs' settlements with the agencies. One of the conditions in the settlements was the appointment of staff to specific fair housing responsibilities. Unless otherwise indicated, the information in this section reflects the status of fair housing organization and staffing within the agencies as of November 1977.

A. FRB

Within the FRB, responsibility for enforcement of fair housing and equal credit laws is shared by the Consumer Affairs, Legal, Banking, and Supervision and Regulation Divisions. In 1974 FRB established the Office of Saver and Consumer Affairs, in 1976 redesignating it the Division of Consumer Affairs. The Division has primary responsibility for administering the FRB's functions under Title VIII and other credit nondiscrimination laws affecting fair housing.

In November 1977 there were an estimated 43 to 49 positions allocated to the Consumer Affairs Division, and all but two were filled. None of the

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[228] U.S., Congress, Senate Committee on Banking, Housing, and Urban Affairs, *Report on Fair Lending Enforcement by the Four Federal Financial Regulatory Agencies*, 94th Cong., 2d sess., June 3, 1976.

[229] Janet Hart, Director; Jerauld C. Kluckman, Associate Director; Neil Butler, Associate Director; Al Sibert, Review Examiner; and Anne Geary, Chief, Equal Credit Opportunity Section; all of Consumer Affairs Division, FRB, interview, Oct. 26, 1977; Shockey and others interview; William Longbrake, Special Assistant to the Chairman, and Jerry Langley, Attorney, Legal Division, Operating Banks Section, FDIC, interview, Oct. 28, 1977; and Warwick interview.

[230] COC has stated:

> The reason that we have not issued cease and desist orders or other formal sanctions is that to date we have received voluntary compliance, as in the instance of the appraisal, noted above. We have not referred cases to the Department of Justice because we have not yet found violations that we have been unable to conciliate. When, upon adoption of the Regulation B enforcement guidelines, we begin taking action upon past violations, we will make referrals to Justice when our own enforcement procedures have been exhausted. Again, upon adoption of the guidelines, in appropriate cases we will require national banks to implement affirmative programs to redress past patterns of discrimination. COC comments, p. 5.

[231] FHLBB comments, p. 4.

[232] 43 Fed. Reg. 29,256 (1978).

staff, however, spends all of his or her time on fair housing matters.[232] The Director of the Division estimated she spends one-third of her time on fair housing.[233]

The Consumer Affairs Division drafts regulations pursuant to ECOA, administers the Home Mortgage Disclosure Act, participates in interagency task forces related to fair housing, and monitors the efforts of Reserve Banks to educate State member banks and enforce compliance with laws prohibiting discrimination in credit transactions. The staff participates from time to time in onsite examinations of State member banks. The staff also drafts examiners' manuals and checklists for use in examinations, and is in charge of the consumer affairs schools which provide training in identifying discriminatory practices that are in violation of the equal credit and fair housing laws. Finally, the Division handles and refers complaints for investigation by the Reserve Banks and other Federal enforcement agencies.

Within the 12 Reserve Banks there is an FRB examiner force that monitors compliance by State member banks and investigates alleged discrimination. This examiner force is under the immediate control of senior examination personnel in each Reserve Bank. All of the Reserve Banks have either established or will soon establish a separate consumer unit under the direction of a senior officer in charge of examinations.[234]

B. FDIC

On October 25, 1977, the FDIC reorganized its Office of Bank Customer Affairs and created an Office of Consumer Affairs and Civil Rights. There is to be a civil rights division within that office to be headed by a newly appointed civil rights specialist.[235] This individual, who will have the title Director of the Civil Rights Branch, will have responsibility for all matters relating to fair housing. When that position is filled, the staffing level for the Civil Rights Branch will be decided.[236]

The FDIC also plans to reorganize fair housing responsibilities in the regional offices. As of November 1977, the details of the regional reorganization had not been developed and will be deferred until the new Office of Consumer Affairs and Civil Rights is fully staffed.[237]

C. COC

The Consumer Affairs Division within the Office of the COC handles most of the agency's fair housing responsibilities. The Division was created in September 1974,[238] and employs seven persons. As of November 1977, the Division had one vacancy.

Recently there has been a reorganization of the Consumer Affair Division designed to provide substantial additional resources for civil rights enforcement. COC has created:

> a Civil Rights Division which will be operational in September, 1978. Another component of the reorganization is the establishment of a Community Development Office which will have the objective of achieving the aims of the Community Reinvestment Act through nonregulatory means, in addition to our regulatory enforcement of that Act.

COC notes that the Civil Rights Division will assume most of the responsibility for fair housing matters.[239]

The Consumer Affairs Division handles all consumer complaints including those relating to fair housing, and reviews and analyzes all consumer examinations of national banks. The Director of the Division, who is an Associate Deputy Comptroller, reports directly to the Comptroller and spends approximately 25 percent of the time on fair housing matters.[240]

At any given time there are approximately 140 specially trained consumer examiners in the field conducting consumer examinations. Moreover, COC's Economic Research Department has devoted a significant amount of time to ensuring that data are collected and analyzed and that reports are written based on that analysis.[241]

In addition to the Washington office's consumer affairs staff, each of the 14 national bank regions has an examiner designated as a regional consumer

[232] The staff of the Consumer Affairs Division also has responsibilities pertaining to the Fair Credit Reporting Act, the Real Estate Settlement Procedures Act, the Truth in Lending, Fair Credit Billing, and Consumer Leasing Acts, national flood insurance, and reviewing interest on deposits.
[233] Hart and others interview.
[234] Burns letter.
[235] Nov. 4, 1977, Longbrake letter.
[236] Ibid. As of March 1978, the Director had not yet been selected and staff assignments in fair housing had not been finalized. William Longbrake, Special Assistant to the Chairman, FDIC, telephone interview, Mar. 31, 1978.
[237] Nov. 4, 1977, Longbrake letter.
[238] Heimann letter.
[239] COC comments, pp. 2 and 6.
[240] The bulk of his time is normally spent on other consumer affairs matters. Recently, however, a considerable amount of his time has been devoted to fair housing. Shockey and others interview.
[241] Heimann letter.

specialist who is responsible for coordinating and reviewing the consumer compliance examination including the fair housing review. These regional consumer specialists also receive support from regional counsel and regional administrators.[242]

D. FHLBB

FHLBB abolished its Office of Housing and Urban Affairs which traditionally handled the bulk of fair housing activities at the national level.[243] In its stead, FHLBB created an Office of Community Investment which will deal with fair housing complaints as well as with other consumer issues. One attorney, who has previous experience in the area of fair housing, has already been assigned to this office and a director has been selected, although as of November 1977 the number and specific responsibilities of staff had not yet been determined.[244] All of FHLBB's examiners now have fair housing responsibilities.

During 1977 the Office of Examination and Supervision designated a civil rights specialist in each of its 12 districts. FHLBB has stated that, "The Civil Rights Specialists have been committed to devote at least 50 percent of their time to civil rights matters; many devote all of their time." They will review the fair housing components, including ECOA and HMDA, of the examiner reports and serve as advisors in fair housing. FHLBB has also created the position of Special Assistant to the Director of the Office of Examination and Supervision for civil rights matters.[245] That position was filled in January 1978 and is full time. The specialist will have responsibility for monitoring examiner reports at the Washington level with respect to fair housing.

[242] Ibid.
[243] Warwick telephone interview.
[244] Warwick letter.
[245] As of Mar. 16, 1978, FHLBB had still not finalized its reorganization of fair housing activities. Lucy Griffin, Director, Consumer Division, Office of Community Investment, FHLBB, telephone interview, Mar. 16, 1978. 42 Fed. Reg. 1242, 1261 (1977) (to be codified in 12 C.F.R. § 202.13).

Chapter 4

VETERANS ADMINISTRATION

Loan Guaranty Service

Summary

The Loan Guaranty Service (LGS) in the Department of Veterans Benefits administers programs to assist veterans in buying homes. In these programs, the Veterans Administration (VA) has responsibilities under Title VIII of the Civil Rights Act of 1968, the Equal Credit Opportunity Act, Title VI of the Civil Rights Act of 1964, and Executive Order No. 11,063. The combined effect of these authorities is to obligate VA to ensure that minority and female veterans are given an equal opportunity to participate in VA housing programs and that all parties involved in VA housing programs—sellers, builders, developers, lenders, brokers, and other representatives of the real estate industry—deal with minority and female buyers on a nondiscriminatory basis.

Responsibility for implementing VA's fair housing policies lies with program staff located in 49 regional field stations. In addition to their primary functions of processing loan applications and guarantees and overseeing management of VA-acquired properties, the regional staff also process discrimination complaints and ensure that participants in VA programs sign certifications of nondiscrimination.

Day-to-day oversight of VA's fair housing program is left to a staff of only three full-time professionals, a decrease of one staff position since 1974. Moreover, this staff lacks a full-time director with sufficient authority to ensure execution of VA's fair housing program.

VA relies primarily upon signed nondiscrimination certifications and affirmative marketing certifications to ensure that participants in VA programs will not discriminate on the basis of race, color, religion, national origin, and sex. This certification process, however, is weak in the following ways:

- Certifications do not prohibit lenders from engaging in discriminatory activity with regard to nonveterans even though such activity might discourage minority or female veterans from seeking credit with the lender.
- The certification does not require builders to set goals for the number of houses they sell to minorities or women.
- VA does not regularly monitor compliance with its nondiscrimination and affirmative marketing certifications and has reported that it sees no need to do so in the absence of complaints.

VA's fair housing complaint handling procedures have been inadequate. However, draft revised complaint procedures issued in July 1978, if adopted, may resolve some of the present inadequacies, such as VA's failure to encourage complainants to contact VA and to inform complainants that their complaints are under investigation.

Nonetheless, these proposed revisions fail to remedy major deficiencies. For example, rather than conduct substantial investigations, VA may still accept lenders' rationalizations for the alleged discriminatory act. Moreover, the procedures contain no standards for complaint resolution.

There is considerable evidence that VA itself discriminates against minorities in its loan program.

- The participation rate of black and Hispanic veterans is considerably lower than the percentage of eligible black and Hispanic veterans.
- VA data indicate that VA is less likely to make loans to minority loan applicants than to equally

or less qualified nonminority veterans, and that when it does make loans to minorities it gives them less favorable terms and conditions.

• VA's own investigations of complaints against its regional offices reveal that some of these offices have been guilty of discrimination. However, when VA has found discriminatory practices in its own regional offices, it has not instituted procedures to correct those practices.

The data VA collects on participation in its programs are compiled by race and ethnic origin, but not by sex or marital status. VA does not tabulate data on rejected applications although these data would enable VA to assess minority participation rates. Further, the data that VA has collected are not used to assist VA regional offices to improve their performance.

Although VA regulations permit sanctions against participants in VA programs who practice illegal discrimination which is not corrected voluntarily, VA has no procedures for applying sanctions for fair housing violations. Moreover, VA appears never to have used its power to impose sanctions such as suspension from program participation or to enforce compliance with fair housing law, although there is clear evidence that some participants in VA programs have engaged in discriminatory housing practices that they would not correct voluntarily. To illustrate, VA permits members of the real estate industry who are respondents in Department of Justice enforcement actions to continue to participate in VA programs. VA does not even investigate these participants to determine whether the fair housing violations found by the Department of Justice result in discrimination in VA programs.

I. Program and Civil Rights Responsibilities

A. Program Responsibilities

The Loan Guaranty Service (LGS), in the Department of Veterans Benefits, provides loan guarantees or insurance of veterans' mortgages.[1] It also makes direct loans to veterans who are unable to obtain mortgages in some rural areas[2] and engages in the sale of property acquired through mortgage foreclosures.[3]

The primary role of the Loan Guaranty Service is to assist veterans in becoming homeowners and ensure that they remain so. In addition to veterans, however, there are a number of others who benefit from the programs of VA's Loan Guaranty Service, including:

• *Lenders:* [4] If, with VA's approval, a lender makes a home mortgage or home improvement loan to a qualified veteran, VA will guarantee the loan, minimizing the risk to the lender. The guarantee provides that, if the veteran does not repay the loan, VA will repay it or some portion, depending upon the terms of the guarantee.[5] Some lenders receive advance permission from VA to make home mortgages to veterans. In these cases, VA will automatically guarantee any mortgage loan the lender makes to a qualified veteran without specific VA approval in each instance. This authority provides a competitive advantage since it enables lenders to make loans to veterans more promptly than lenders without the automatic approval authority.[6]

• *Builders and developers:* The VA issues subdivision feasibility letters to builders who apply for them if VA determines that there is a need for the

[1] Since its inception in 1944 through September 1977, the VA guaranteed 9.6 million home loans totaling approximately $139 billion. Max Cleland, Administrator of Veterans Affairs, Veterans Administration, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Nov. 11, 1977, attachment (hereafter cited as Cleland letter). After reviewing this report in draft form, VA wrote to this Commission, "The enclosed comments incorporate the latest developments in the Loan Guaranty program and our fair housing program." Max Cleland, Administrator of Veterans Affairs, Veterans Administration, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, "VA Comments on Draft Housing Update," Aug. 29, 1978 (hereafter cited as VA comments). The information VA has supplied about these developments has been added to this report.

[2] Direct loans are a very small part of the VA's overall loan program. From 1950 though September 1977, approximately 329,000 direct loans were made. Cleland letter. Only about 9,000 of these loans were made since June 1974, when the research for this Commission's previous review of the Loan Guaranty Service was conducted. U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. II, *To Provide. . .For Fair Housing* (1974), p. 219 (hereafter cited as *To Provide. . .For Fair Housing*).

[3] From January through November 1977, VA sold 15,359 acquired properties for a total of $355,620,755, an average price of about $23,000 per property. Information provided by U.S. Veterans Administration, Loan Guaranty Service, Jan. 12, 1978.

[4] As of October 1977, there were about 5,000 lender offices participating in the VA program. Max Cleland, Administrator of Veterans Affairs, Veterans Administration, letter to Gregory Ahart, Director, Human Resource Division, General Accounting Office, Oct. 17, 1977. More than 75 percent of the loans VA guarantees are made by mortgage bankers; i.e., institutions which make mortgages but do not accept deposits from customers. Mortgage Bankers Association of America, *Mortgage Banking* (1976). Mortgage bankers serve as an intermediary between local real estate brokers and investors in real estate.

[5] VA guarantees loans for up to 60 percent of the loan amount or $17,500, whichever is the lesser. During fiscal year 1977, 74 percent of all VA loan guarantees were for 100 percent of the loan amount. Cleland letter.

[6] All federally-supervised lenders are entitled to automatic approval authority. In addition, of the approximately 800 mortgage bankers in the country, about 200 have been granted automatic approval authority. George Moerman, Assistant Director for Policy, Loan Guaranty Service, Veterans Administration, interview, Jan. 26, 1978.

proposed housing and that the construction plans are feasible.[7] These letters are oftentimes used by the builders when they attempt to obtain financing for construction. In addition, VA will assign a fee appraiser to estimate the current reasonable value of a house. For this appraisal the requestor will be charged a fee by the appraiser according to a fee schedule established by VA. The maximum loan VA will guarantee on the house is the reasonable value established by VA.[8]

• *Individual home sellers:* For a fee, VA will approve the appraisal of an individual's home to determine the current market value. This appraisal is necessary for the seller to sell the house to a creditworthy veteran.[9]

• *Appraisers:* Approved appraisers are placed on a roster in each VA regional loan guaranty office. For each appraisal, VA designates an appraiser from that roster.[10]

• *Real estate brokers:* VA pays real estate brokers to manage property acquired by VA through foreclosure of guaranteed and direct loans. VA also approves as eligible real estate brokers who sell these homes on the open market on a commission basis.[11]

• *Purchasers of VA-acquired properties:* VA will often acquire properties through foreclosures. VA is charged with the responsibility of marketing and selling these properties. As stewards of Government assets, VA is obligated to liquidate properties at the best price and terms available. Acquired properties are repaired as appropriate to enhance salability and to place them in condition to compare favorably with competitive properties. VA sales prices are in line with current market values and downpayment requirements are modest in order to attract homeowner occupants.[12] In most instances, VA assumes mortgages on the properties it sells rather than requiring the purchaser to pay cash.[13]

• *Mobile home park operators:* VA must approve the site for any mobile home purchased with a guaranteed loan. VA sets requirements for such sites, including access to water and sewer facilities, absence of hazardous conditions, and assurance that the site will not adversely affect the "scenic" conditions.[14] Unless mobile home park operators adhere to VA regulations, their sites will not receive VA approval.[15]

• *Mobile home dealers:* The VA administrator will not approve the purchase of a mobile home from a dealer if VA finds that the dealer has been unfair or prejudicial to veteran purchasers.[16]

• *Condominium associations:* In April 1975 VA implemented a program permitting veterans to obtain loan guarantees for the purchase of condominiums.[17]

B. Civil Rights Responsibilities

VA is charged by law and Executive order to administer its housing programs for veterans without discrimination on the basis of race, color, religion, sex, or national origin. The major civil rights requirements affecting VA's housing program are:

• Title VIII of the Civil Rights Act of 1968.[18] Title VIII requires all Federal agencies, including VA, to administer their programs and activities relating to housing and urban development affirmatively to further fair housing.[19] Thus, VA is obligated to ensure that not only its own practices, but also those of the participants in its direct and guaranteed home mortgage programs are consistent with the fair housing goals of Title VIII.

• Executive Order No. 11,063. This order requires all Federal agencies, including VA, to "take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin" in the sale of housing assisted or guaranteed through VA programs.[20] It thus places fair housing enforcement responsibility on VA and requires nondiscrimination by the participants, including lenders, in VA programs.

[7] In making these determinations, VA examines such matters as the existence of water and sewer facilities. 38 U.S.C. § 1804(a) (Supp. V 1975).

[8] VA comments.

[9] During 1977 VA received 712,681 requests for appraisals of individual homes. VA comments.

[10] As of November 1977, the VA dealt with approximately 5,500 fee appraisers annually. Cleland letter.

[11] As of 1977, VA dealt with approximately 2,600 management brokers and 42,000 sales brokers. Cleland letter.

[12] VA comments.

[13] Of VA property sales from January through November 1977, only 1,679 were cash sales. Information supplied by Veterans Administration, Loan Guaranty Service, to Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Jan. 12, 1978.

[14] 38 C.F.R. § 36.4208 (1977).

[15] 38 C.F.R. § 36.4235 (1977). In calendar year 1977, VA guaranteed 1,566 loans to veterans purchasing mobile homes. Cleland letter.

[16] 38 C.F.R. § 4235 (1977).

[17] R.C. Coon, Director, Loan Guaranty Service, Veterans Administration, letter to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Apr. 22, 1976.

[18] 42 U.S.C. § 3604 (Supp. V. 1975).

[19] 42 U.S.C. § 3608(c) (Supp. V. 1975).

[20] Exec. Order No. 11,063, 3 C.F.R. 653 (1959–63 Compilation).

• The Equal Credit Opportunity Act (ECOA).[21] Since VA makes both direct loans to veterans and sets standards of creditworthiness[22] for veterans applying for guaranteed loans, VA's foremost role under the Equal Credit Opportunity Act is that of a creditor,[23] and it may not practice discrimination prohibited by the act.[24] In addition, VA has the responsibility to ensure that it does not do business with lenders who fail to comply with ECOA. VA apparently disagrees, however, and wrote to this Commission:

It should be noted that Section 704 of the Equal Credit Opportunity Act, U.S.C., Title 15, Sec. 1691 et seq. specifically designates 12 Federal agencies as having enforcement responsibilities under the act. VA is not included in that list, and no discretionary authority is contained within the act or Regulation B to allow the designation of additional enforcement agencies.[25]

However, although ECOA does not assign VA any specific role for enforcement,[26] VA is authorized to ensure that the lenders with whom it deals comply with Federal law and do not deal unfairly with veterans.[27] VA, itself has written to this Commission, "VA has the power to suspend lenders proven to be in violation of ECOA."[28] If VA does not exercise its authority to ensure that the lenders with whom it does business are in compliance with the Equal Credit Opportunity Act, it may find itself abetting illegal discrimination against veterans.[29]

• Title VI of the Civil Rights Act of 1964.[30] Programs of insurance or guaranty are exempt from Title VI,[31] and thus Title VI probably does not extend to lenders making VA-guaranteed loans. However, the term Federal financial assistance has been interpreted broadly[32] and may extend to builders and developers by way of the benefit received from VA subdivision approval. There are, however, no VA regulations to this effect.

II. Organization and Staffing

The Director of the Loan Guaranty Service is responsible for implementing nondiscrimination requirements in all applicable segments of VA's housing programs. However, the primary function of this official is the general administration of VA housing programs. The day-to-day oversight of LGS equal housing opportunity functions is assigned to a small staff within the Office of the Director. This Equal Housing Opportunity Staff (EHOS) performs an advisory role within LGS with minimal authority or enforcement powers. As the Commission observed in 1974, EHOS lacks a full-time director with sufficient authority to ensure execution of VA's fair housing program.[33]

[21] 15 U.S.C. § 1691–1691(f) (1976).

[22] DVB Circular 26–75–28, June 3, 1975; Change 1, Nov. 24, 1975; Change 2, Nov. 22, 1976; and Change 3, July 21, 1977.

[23] The Equal Credit Opportunity Act defines "creditor" as any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit. 15 U.S.C. § 1691a(e) (1976). The VA circular on the Equal Credit Opportunity Act notes that VA is responsible, as a creditor, for compliance with the act, to the extent of its role in the credit transaction. DVB Circular 26–75–28, June 3, 1975.

[24] The Federal agency that administers compliance with this law concerning VA as a creditor is the Federal Trade Commission, VA Form FL 26–513 (April 1977).

[25] VA comments. Regulation B, discussed in the chapter in this report on the Federal financial regulatory agencies, is issued by the Federal Reserve Board pursuant to ECOA. It applies to all creditors covered by ECOA.

[26] 15 U.S.C. § 1691c(c) (1976).

[27] VA is authorized to ensure that the lenders with whom it deals demonstrate the proper ability to service loans adequately, exercise proper credit judgment, and have not engaged in practices which are detrimental to the interests of veterans or the Government. 38 U.S.C. § 1804(d) (Supp. V 1975).

[28] VA comments.

[29] It should be noted, moreover, that Federal Trade Commission (FTC) staff, in an informal opinion, held that VA is authorized to impose requirements upon lenders to retain applicant information for monitoring purposes. In that opinion, FTC staff stated:

> The staff of the Division of Special Statutes concurs with the conclusion of the VA General Counsel that the VA is an enforcement agency as contemplated by Section 202.5(b)(2). That section permits creditors to obtain any information which may be required by an enforcement agency to monitor compliance with the Equal Credit Opportunity Act or any other Federal or State statute or regulation. To the extent that the VA has the authority, under its enabling law or any other Federal statute, to require creditors to retain applicant information, it may impose such requirements notwithstanding Regulation B and the Equal Credit Opportunity Act. Lewis A. Goldfarb, Acting Assistant Director for Special Statutes, Federal Trade Commission, letter to A.J. Bochicchio, Acting Chief Benefits Director, Veterans Administration, July 25, 1977.

Section 202.5(b)(2) states:

> Notwithstanding any other provision of this section, a creditor shall request an applicant's race/national origin, sex, and marital status as required in section 202.13 (information for monitoring purposes). In addition, a creditor may obtain such information as may be required by a regulation, order, or agreement issued by, or entered into with, a court or an enforcement agency (including the Attorney General or a similar State official) to monitor or enforce compliance with the Act, this Part, or other Federal or State statute or regulation. 12 C.F.R. § 202.5(b)(2).

This Commission believes that authorization to require compliance information from lenders implies authorization to use that information to secure compliance.

[30] 42 U.S.C. § 2000d (1970).

[31] 42 U.S.C. § 2000d–1 (1970).

[32] See U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. VI, *To Extend Federal Financial Assistance* (1976).

[33] The Leadership Conference on Civil Rights has also commented on VA's inadequate staffing. It stated, "The Veterans Administration has done

As of January 1978, there were three full-time professionals among the EHOS,[34] a decrease of one position since 1974.[35] Between December 1975 and February 1977, one of these three staff members was absent from LGS,[36] leaving only two full-time Equal Housing Opportunity Staff in LGS for more than 1 year. No additional staff were assigned or detailed to the EHOS during his absence.

The EHOS performs a variety of tasks within LGS. For example, during 1977 one senior staff member spent nearly 50 percent of his time in the field[37]; the remainder of his time was devoted to such activities as liaison with advocacy groups, ad hoc projects for the Director, and contacts with complainants. The other senior staff member prepares internal reports, testimony, responses to congressional inquiries, and comments on housing regulations proposed by other Federal agencies.[38] The third staff member is responsible for data analysis and complaint handling. There is little coordination of the activities of EHOS members by the Director of the LGS. The two senior staff each receive tasks and instructions from the Director.[39] As a result, they do not work closely together and are often unaware of each other's activities.

In its Washington office, LGS has five major operating divisions, each headed by an Assistant Director: Liquidation, Construction and Valuation, Property Management, Loan Policy, and Administration (see exhibit 4.1).

The offices managed by these five Assistant Directors have responsibility for carrying on VA fair housing policy in area LGS programs. For example, the Office of Loan Policy was chiefly responsible for writing VA procedures under the Equal Credit Opportunity Act[40] and monitoring VA performance under these procedures.

Regional program staff have responsibility for implementing fair housing policy on a day-to-day basis. As shown in exhibit 4.2, they are located in 49 regional offices or field stations. Their primary role is processing applications for loans and loan guarantees and overseeing the management and sale of properties repossessed by VA through mortgage foreclosure. However, they also process discrimination complaints and ensure that participants in VA programs sign certifications of nondiscrimination.[41]

III. Certifications

A. Veterans and Purchasers of Acquired Property

VA continues to rely upon certification of nondiscrimination as one of its chief enforcement tools. As it did in 1974, it requires that veterans and purchasers of VA-acquired property certify they will not discriminate on the basis of race, color, religion, and national origin in the resale of properties they purchase through VA programs. Moreover, VA has amended these certifications to conform to the 1974 Title VIII amendment by requiring certification that there will be no discrimination on the basis of sex.[42]

B. Appraisers

VA continues to require appraisers to certify that they will not "be influenced" by the race, color, religion, or national origin of occupants or neighbors in estimating the value of a dwelling. This certification was also amended to add sex of occupants or neighbors as a factor which may not be considered in making appraisals.[43]

C. Brokers

VA also continues to require that brokers participating in the sale or management of VA-acquired properties sign nondiscrimination certifications. By signing these certifications, brokers promise that:

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nothing to establish an Office of Equal Housing Opportunity with adequate staff resources and authority." Leadership Conference on Civil Rights, "The Carter Administration and Civil Rights; An Assessment of the First Year" (January 1978), p. 32.

[34] All three members were classified as equal opportunity specialists. There were two GS–14s and one GS–13.

[35] EHOS staffing in 1974 is discussed in *To Provide. . .For Fair Housing.* The position which was eliminated was for a GS–7 equal opportunity specialist. Eleanor Harmon, Special Assistant to the Director, LGS, VA, interview, Jan. 12, 1978 (hereafter cited as Harmon interview, Jan. 12, 1978).

[36] During this period, one GS–14 served as special assistant to the mayor of Nashville, Tenn., under an exchange program of the Intergovernmental Personnel Act of 1970. 42 U.S.C. § 4701 (1970).

[37] Leon Cox, Special Assistant to the Director, Loan Guaranty Service, VA, interview, Nov. 29, 1977 (hereafter cited as Cox interview), and U.S., Congress, *Hearings on Equal Opportunity in Veterans Administration Housing Programs Before the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary,* 94th Cong., 2d sess., 1976, p. 15 (hereafter cited as 1976 Hearings).

[38] This staff member also reviews written complaints and the adequacy of efforts taken by VA field stations to resolve such problems. Complaint reviews, however, account for only 10 percent of this staff member's time. Harmon interview, Jan. 12, 1978.

[39] The third staff member receives instructions from one of the senior staff members and the Director of the Loan Guaranty Service. Ibid.

[40] 15 U.S.C. § 1691 *et seq.* (1976).

[41] Harmon interview, Jan. 12, 1978.

[42] See, for example, VA Form 26–1802a (application for home loan guarantee) (June 1977); VA Form 26–8641 (application for mobile home loan guarantee) (April 1975); and VA Form 26–6705 (application to purchase acquired property) (December 1975).

[43] VA Form 26–1803 (residential appraisal report) (November 1977).

EXHIBIT 4.1

Organization of Loan Guaranty Service, Department of Veterans Benefits, Veterans Administration

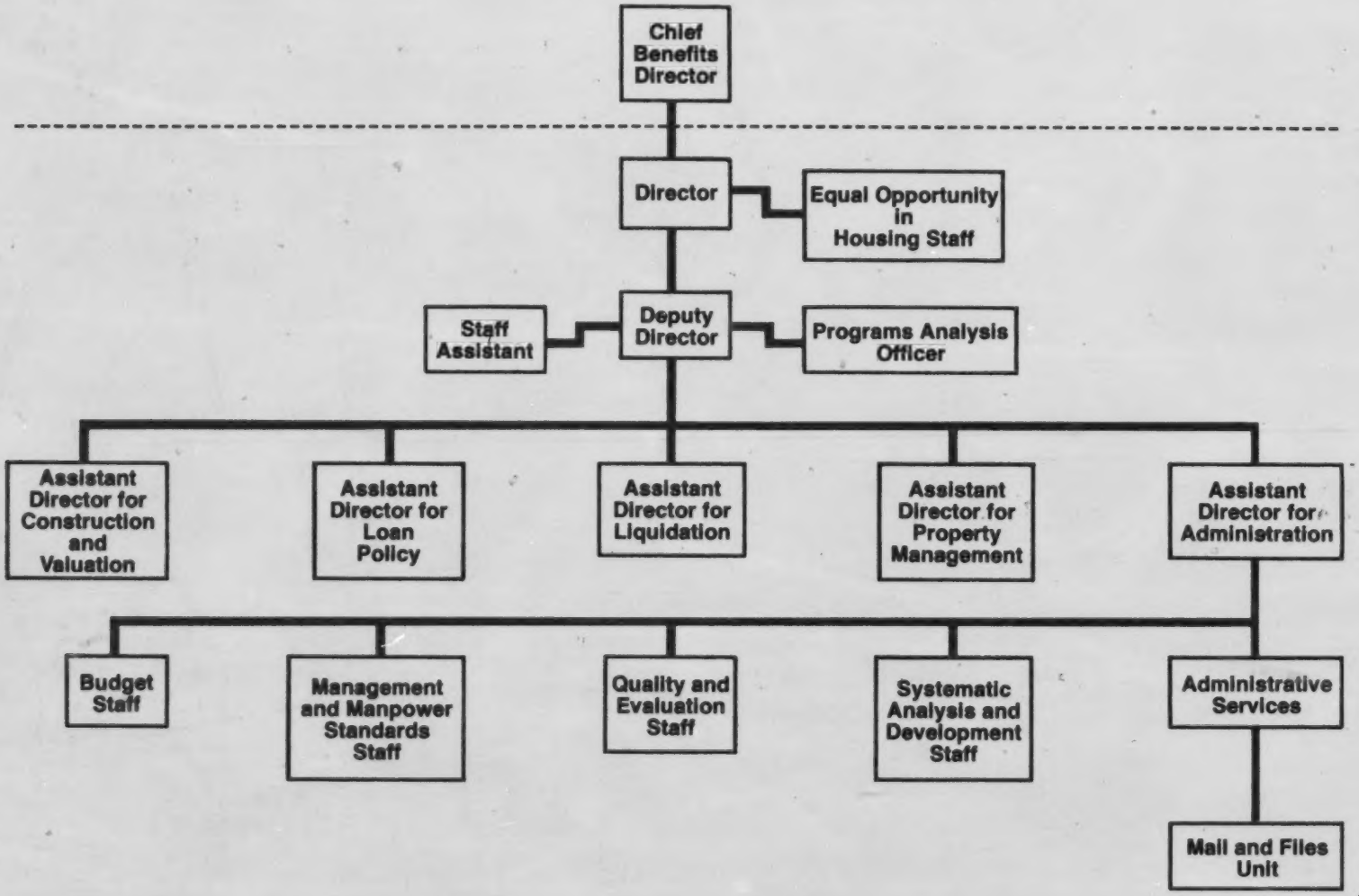

EXHIBIT 4.2

Veterans Administration Loan Guaranty Service Regional Divisions

(A regional office is located in San Juan, Puerto Rico.)

• Neither they nor anyone acting in their behalf will violate Title VIII or Executive Order No. 11,063. This commitment extends not only to the sale or rental of VA-owned property, but also to all properties they handle.
• They will instruct staff in nondiscrimination policies.
• They will display fair housing posters prominently where sales or rentals take place.
• They will include notice of equal housing opportunity policies in all advertising.
• They will utilize minority media to advertise properties located in predominantly white areas.
• They will affirmatively recruit staff from both minority and majority groups.[44]

A positive feature of this certification is that it extends to the sale and rental of all property a broker handles, making maximum use of VA's leverage to further Title VIII fair housing goals. However, the certification could be improved. It could be revised to make clear to those who sign that Title VIII prohibits housing discrimination on the basis of race, color, religion, sex, and national origin. Currently, the certificate does not state what is prohibited by Title VIII. The certification could also be expanded to require affirmative recruitment of both sexes.[45] In addition, the certification could be improved if it were expanded to require brokers who share listings with other brokers to take affirmative steps to exchange listings with both minority and nonminority brokers.[46]

The broker certification is required jointly by HUD and VA. Unless brokers sign a certification, they will not be permitted to serve as management or sales brokers by either the Department of Housing and Urban Development or VA. Further, the two agencies have agreed that a violation by one agency will be treated as a violation by the other agency as well.[47] In 1974 this Commission observed that the certifications were not being required of brokers participating in HUD or VA programs. However, in 1977, VA reported that it requires all of its participating real estate brokers to sign the joint HUD–VA certificates. VA informed this Commission, "Now a duly signed nondiscrimination certification must be on file at the VA regional offices or a prospective purchaser's offer tendered by a broker who has not signed a certification will be returned without action."[48]

D. Builders and Developers—Affirmative Marketing

1. Background

In mid-1972 VA discontinued its practice of requiring nondiscrimination certifications from builders and developers who requested subdivision approval.[49] Instead, VA proposed to replace the discontinued certifications with a requirement that builders and developers submit a written plan describing the procedures they would follow to market their properties affirmatively to further fair housing goals.[50] However, affirmative marketing requirements were not adopted until July 1977.[51] Thus, from mid-1972 until mid-1977, VA provided subdivision approvals without requiring certificates of nondiscrimination.[52] During this time, VA's operations contradicted its regulations, which state that:

> Administrator". The form was the Equal Opportunity in Housing Notice, which is prominently placed on the Request for Determination of Reasonable Value, VA Form 26–1805. This notice states:
>
> Federal laws and regulations prohibit discrimination because of race, color, religion or national origin in the sale or rental or financing of residential property. Numerous state statutes and local ordinances also prohibit such discrimination.
>
> Noncompliance with applicable antidiscrimination laws and regulations in respect to any property included in this request shall be proper basis for refusal by the VA to do business with the violator and for refusal to appraise properties with which the violator is identified. Denial of participation in any program administered by the Federal Housing Administration because of such violation shall constitute basis for similar action by the VA.
>
> Since a determination of reasonable value by VA is requisite for any application for a direct or guaranteed loan, all parties including lenders, builders and brokers, seeking to sell housing to a veteran have to request a VA appraisal. The party requesting a VA appraisal is required to sign and date the appraisal request form and thereby acknowledge their fair housing responsibilities and the sanctions that will be imposed for violations thereof. VA comments.

The Commission notes that VA's comments pertain to a request by a builder for a determination of reasonable value, a procedure which occurs subsequent to the subdivision approval process discussed in the text.

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[44] VA Form 26–318 (August 1975).
[45] In contrast, the Farmers Home Administration requires brokers to recruit sales or rental staff from both sexes. 42 Fed. Reg. 45,894 (1977) (to be codified in 7 C.F.R. § 1901.203(c)(ii)).
[46] Real estate information is shared among brokers on a formal and informal basis. In the last 10 years, a number of private enterprises have developed systems to facilitate the sharing of such information. They have become known as multiple listing services (MLS). However, these services have been used as vehicles of discrimination through restrictive membership practices which may exclude minority brokers, the listing of property only in nonminority areas, the withholding of nonminority listings from an MLS until a nonminority buyer is available, and the restriction of minority agents through the discriminatory employment practices of real estate brokers.
[47] VA Form 26–8138 (August 1975). The form states "debarment by either HUD or VA will be honored by both."
[48] Cleland letter.
[49] This certification is discussed in *To Provide. . .For Fair Housing*, p. 250.
[50] 37 Fed. Reg. 17,217 (1972).
[51] DVB Circular 26–77–13, May 18, 1977.
[52] In response, VA offered the comment that:

Contrary to the statement that VA operations were at variance with VA regulations, from mid 1972 through mid 1977 VA required a nondiscrimination certification "in the form prescribed by the

> Each builder, sponsor or other seller requesting approval of site and subdivision planning shall be required to furnish a certification, in the form prescribed by the Administrator, that neither it nor anyone authorized to act for it will decline to sell any property included in such request to a prospective purchaser because of his or her race, color, religion or national origin. Site and subdivision analysis will not be commenced by the Veterans Administration prior to receipt of such certification.[53]

As noted in 1974, VA offered a number of excuses for the lack of certification during that 5-year period.[54] VA justifies its inaction from 1974 through 1976 by stating that it "cooperated" with HUD while HUD developed voluntary marketing agreements with builders.[55] However, the extent of VA's cooperation was to issue a circular to its field stations, admonishing them to "note" any HUD-negotiated voluntary plans in their areas and to apprise the Washington office of "any new developments," including any HUD requests for VA endorsement of agreements.[56]

In March 1974 the HUD Assistant Secretary for Equal Opportunity wrote to the Administrator of Veterans Affairs explaining that in fiscal year 1975 HUD hoped to obtain voluntary, areawide, affirmative marketing agreements with the housing and home finance industries in 60 communities throughout the country. The Assistant Secretary also asked VA to sign an agreement that had been developed in Sacramento, California.[57] The VA Administrator responded that he believed VA could make significant contributions to the development of agreements. However, he did not state that VA was willing to sign the plan in Sacramento[58] and, indeed, VA never formally endorsed any voluntary agreements which HUD negotiated.[59]

Fair housing groups report that they believe the absence of a VA affirmative marketing requirement undermined the value of the HUD requirement. They believe that some builders may have sought subdivision approval from VA rather than HUD in an effort to avoid compliance with HUD requirements. VA stated that it was not until VA determined that HUD's policy of voluntary agreements "appeared to be making headway" that "VA once again turned its attention to an overall VA affirmative marketing program."[60]

2. New Affirmative Marketing Requirements

In May 1977 VA issued a circular to all builders and developers who participated in VA programs[61] requiring them to sign an affirmative marketing certification by July 11, 1977,[62] as a condition for receiving any future subdivision approvals or appraisals. By signing the certification, a builder agrees:

- That neither the builder nor any agent of the builder will decline to show or sell any property to a prospective veteran purchaser because of his or her race, color, sex, religion, or national origin if the property was included in a VA appraisal or subdivision approval requested by the builder on or after July 11, 1977;
- To apprise minority and female veteran homebuyers of the availability of the housing offered by the applicant by conforming all advertising to VA Advertising Guidelines for Fair Housing[63];
- To maintain a nondiscriminatory hiring policy and provide all marketing staff with written instructions on and training in affirmative marketing techniques;
- To display prominently the equal housing opportunity poster in each place of business where VA-appraised or approved housing is offered for sale by the applicant;

[53] 38 C.F.R. § 36.4363(c) (1975). No changes in this section of the VA regulations were made from July 13, 1971, until August 1975, when the section was amended to include sex as a prohibited basis of discrimination to be included in the certification. 40 Fed. Reg. 34,595 (1975).

[54] For example, in 1973 VA stated that it was waiting for the President to issue a statement on fair housing. President Nixon issued a fair housing statement in September 1973, but clearly the statement had no bearing on VA programs. VA then stated that it was waiting to issue new requirements until it had perfected its data collection system. *To Provide. . .For Fair Housing*, pp. 251-52. See also R. C. Coon, Director, Loan Guaranty Service, Veterans Administration, letter to Cynthia N. Graae, Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, Dec. 9, 1977, and Donald E. Johnson, Administrator of Veterans Affairs, Veterans Administration, letter to James Harvey, Chairman, Housing Task Force, Leadership Conference on Civil Rights, July 17, 1973.

[55] Coon letter, Dec. 9, 1977.

[56] DVB Circular 26-74-13, Mar. 29, 1974.

[57] Gloria E. A. Toote, Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development, letter to Donald E. Johnson, Administrator, Veterans Administration, Mar. 13, 1974.

[58] Donald E. Johnson, Administrator, Veterans Administration, letter to Gloria E. A. Toote, Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development, Apr. 1, 1974.

[59] As of fiscal year 1977, HUD had negotiated 488 voluntary affirmative marketing agreements. See the chapter in this report on the Department of Housing and Urban Development for a discussion of HUD's voluntary affirmative marketing program.

[60] Coon letter.

[61] DVB Circular 26-77-13, May 18, 1977.

[62] VA Form 26-8791 (April 1977).

[63] Appendix to DVB Circular 26-77-13, May 19, 1977.

• To incorporate the equal housing opportunity logo,[64] slogan, or statement as outlined in the VA Advertising Guidelines for Fair Housing in all advertising, including outdoor signs, radio, television, newspapers, and other printed materials;

• That noncompliance with the foregoing requirements or comparable HUD requirements may constitute a basis for the Administrator to refuse to appraise properties with which the applicant is identified.

The certification is weakened by the fact that it prohibits discrimination against applicants only if they are veterans,[65] even though subdivision approval benefits builders with regard to all housing encompassed by the approval and not merely housing which is sold to veterans.[66] This certification is considerably weaker than the HUD affirmative marketing requirement[67] because it:

• Does not require builders to prepare a written plan detailing the affirmative marketing procedures they will follow.

• Does not require builders to engage in any outreach activities to ensure that minorities and nonminorities will have an equal opportunity to purchase available housing;

• Does not require builders to identify target groups—i.e., racial or ethnic groups or women—who are not expected to apply for the housing because of historical patterns of discrimination or existing neighborhood segregation[68];

• Does not require builders to report on their progress in complying with VA affirmative marketing or the result of their efforts, including racial, ethnic, and sex data on the persons to whom they have sold or rented properties.

• Does not require builders to set goals for the number of houses they sell or rent to minorities or women where there is an indication in the vicinity of the new housing of past housing discrimination against minorities and women.[69]

Before publishing its affirmative marketing circular in May 1977, VA did not issue the circular for public comment. Thus, there was little, if any, opportunity for comments from outside groups which might have helped VA improve the circular.[70]

In response to criticism of VA's affirmative marketing requirements, VA maintained that its affirmative marketing certification "requires implementation of basic affirmative marketing procedures." Specifically, VA stated:

> Title VIII accorded HUD the authority and responsibility for administering the fair housing law and directed other executive departments and agencies to affirmatively administer their housing programs and to cooperate with HUD. HUD introduced the concept of affirmative marketing in 1972 with publication of its affirmative marketing regulations. These regulations require builders to submit written plans outlining how housing will be affirmatively marketed, which includes outreach activities to minority homebuyers, identification of target groups, as well as submission of progress reports. The VA affirmative marketing program for builders was specifically designed to complement, not duplicate, HUD affirmative marketing requirements, the HUD–NAHB and the HUD–NAR voluntary marketing agreements, and local voluntary areawide affirmative marketing agreements as they are developed by HUD. Consequently, the VA affirmative marketing certification requires implementation of basic affirmative marketing procedures.[71]

VA's observations overlook the valuable gains which could be made if VA and HUD had identically strong affirmative marketing requirements. Because VA's requirements, in their present form, are weaker than HUD's, they therefore may be confusing to participants and may undermine HUD's stronger efforts. Moreover, although VA

[64] The logo is the trademark often used to symbolize equal housing opportunity. It is included in the fair housing poster.

[65] VA Form 26–8791 (April 1977).

[66] The benefits to builders of subdivision approval are discussed in section I, Program and Civil Rights Responsibilities.

[67] It is also weaker than the VA proposed requirement. This requirement is discussed in *To Provide. . .For Fair Housing*, pp. 250–56. See also the chapters in this report on the Department of Housing and Urban Development, the Farmers Home Administration, and Interagency Coordination for a discussion of affirmative marketing requirements.

[68] This analysis might be based on such factors as the racial and ethnic composition of the area surrounding the location of the housing, income levels, and patterns of homeownership.

[69] This Commission's position on the minimum elements of an effective affirmative marketing requirement is outlined in *To Provide. . .For Fair Housing*, pp. 71–90, and letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Administrator of Veterans Affairs, Oct. 3, 1972.

[70] In contrast, VA has, in the past on other matters, kept the Commission informed as to its activities and has also actively sought Commission advice about proposed new requirements. See, for example, Dorothy L. Starbuck, Chief Benefits Director, Veterans Administration, letter to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, July 20, 1977, and Aug. 24, 1977, transmitting Department of Veterans Benefits quarterly civil rights reports; R. C. Coon, Director, Loan Guaranty Service, Veterans Administration, letter to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Apr. 26, 1976, asking for comments on proposed regulations on condominium title requirements.

[71] VA comments.

states that its plan is intended to "complement" HUD's, builders who deal exclusively with VA would not be affected by HUD's more comprehensive requirements. Thus, they may encourage builders to participate only in VA's program in order to avoid HUD's stricter requirements for compliance.

E. Other Participants in VA Programs

Given VA's heavy reliance on certification, a major deficiency in VA's equal housing opportunity efforts is that VA did not require certification of nondiscrimination from lenders until December 1977.[72] Despite the fact that discrimination in mortgage finance continues to be a problem, VA has not required lenders to make the same type of equal opportunity commitment that it requires of most other program participants. Under the certification, lenders are required to agree that:

- They will not deny a VA loan to a veteran or discriminate in the terms or conditions of such a loan because of the veteran's race, color, religion, sex, or national origin.
- They will practice equal opportunity if they advertise financing.
- Any models they use in advertising must indicate that financing is offered without regard to race, color, religion, sex, or national origin.[73]

Although the affirmative advertising requirements apply to all advertising concerning the availability of residential financing, the certification is weak. First, the lender's agreement not to discriminate on the basis of race, color, religion, sex, or national origin applies only to loans to veterans and not to all of a lender's mortgage transactions.[74] Thus, it does not make maximum use of VA's leverage to further fair housing goals, and it does not protect against a lender's discriminatory activity unless a minority or female veteran seeks a VA-guaranteed mortgage from that lender. If a lender is known to discriminate against minorities or women, however, minority and female veterans may not even seek credit with the lender. Second, the certification does not inform lenders that they are required to comply with the Equal Credit Opportunity Act.[75] Indeed, several of the bases of prohibited credit discrimination listed in ECOA are not even mentioned in the certification—namely, discrimination on the basis of marital status, age, and deriving income from public assistance.[76] Third, the certificate does not make clear that lenders are prohibited from engaging in practices which, although not intentionally discriminatory, have the effect of excluding classes protected under the Equal Credit Opportunity Act.[77]

VA does not require any certifications in connection with its programs for guaranteeing loans for mobile homes or condominiums. Thus, for example, although VA must approve the park in which a mobile home will be located,[78] the VA does not require the operator of the park to certify that the park practices fair housing.[79] Similarly, the VA does not require that veterans purchasing condominiums purchase them only when condominium associations certify that they will practice fair housing.[80]

Such associations often buy the members' units when they are offered for sale and may subsequently sell or lease them. Discrimination by members of the association or the association itself in the sale or resale of condominium units might lead to costly lawsuits under Title VIII of the Civil Rights Act of 1964 or other applicable civil rights laws, which could have an effect on the value of the veteran's investment.[81]

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[72] This deficiency was noted in *To Provide. . .For Fair Housing*, p. 233.

[73] VA Form 26–812 (December 1977).

[74] VA wrote to this Commission:

> VA interprets residential financing as encompassing all forms of financing a home, and this includes extension of consumer credit for the purchase of a mobile home; extension of residential credit on conventional terms; and extension of residential credit secured by a second or other subordinate mortgage lien. VA comments.

[75] Although this Commission believes that VA can require that the lenders with whom it deals comply with ECOA, VA apparently has not included such a statement on the certification because it is not specifically named in ECOA as an enforcement agent. This issue is discussed above.

[76] Discrimination on any of these bases is likely to have an adverse effect on women. For example, married women have frequently been denied credit in their own names. Women are disproportionately represented among the elderly and those receiving public assistance.

[77] In passing the Equal Credit Opportunity Act, Congress made clear that not only acts of intentional discrimination but also acts which had the effect of discriminating were prohibited. Such an act might include the formerly common practice of giving adverse consideration to applicants who fail to have telephones listed in their own names. Since few married women have telephones listed in their own names, this practice adversely affects married women as a group. 42 Fed. Reg. 1,255 (1977).

[78] 38 C.F.R. § 36.4208 (1977).

[79] VA rules for financing mobile homes and mobile home lots are codified in 38 C.F.R. §§ 36.4207, 36.4208, and 36.4231–36.4287 (1977).

[80] VA requirements for financing condominium units are codified in 38 C.F.R. § 36.4358 (1977).

[81] Commission staff in a letter to the Director of the Loan Guaranty Service noted previously that veterans owning condominium units in a building in which discrimination has been found by the courts may themselves become tainted with the stigma of lawsuits or even be assessed for a share of the costs of defending the condominium association against the lawsuit. John A. Buggs, Staff Director, U.S. Commission on Civil Rights, letter to R. C. Coon, Director, Loan Guaranty Service, VA, May 10, 1977.

F. Monitoring

The most serious deficiency in VA's fair housing program continues to be that VA does not monitor compliance with the certifications it requires[82] and has no plans for remedy.[83] Taken by themselves, certifications are inherently weak instruments for assuring compliance. Unless VA requires regular reporting and conducts periodic reviews of its program participants, these participants may view the certificates as nothing more than paper promises not to exclude intentionally minority or female veterans solely on the grounds of their race or sex.

Each field station is visited every 18 months by a quality review team from the central office. An integral part of the quality review process is implementation of equal opportunity policies and procedures. When a field station is found to be at variance with a central office policy or procedure, the team brings this to the attention of the loan guaranty officer and the particular operating element. The central office team explains the nature of the variance and trains field staff in the proper interpretation and implementation. In conjunction with the survey team visit, policy staff members at the central office review a random sample of field station loan files to determine if field station findings can be validated. The central office review also includes an examination of randomly selected loan files which were not previously reviewed by the field station. Thus the central office validates case file reviews conducted by field stations and independently reviews other case files to ensure that field stations are properly and uniformly applying VA policies and procedures. The central office checks to ensure that participation in the program is encouraged by timely service, that application of credit underwriting standards is consistent, and that each application is considered individually, based on the particular circumstances and characteristics of the purchaser and the property.[84]

However, in November 1978, VA stated that monitoring is not necessary.[85] VA believes that because it receives few discrimination complaints, it has good evidence that there are no widespread violations of its fair housing requirements. VA also notes that it relies on the results of HUD monitoring and that, if VA were to review the activities of builders, developers, brokers, and appraisers, it would duplicate HUD's work.[86]

VA's explanation of its failure to conduct monitoring is inadequate. There is increasing evidence that lack of complaints is not an indicator of absence of discrimination,[87] especially in the area of housing.[88] Moreover, VA has not sufficiently coordinated its program with HUD to be sure that it can rely on HUD monitoring. It does not know which of its programs are monitored by HUD because not all participants in VA programs are also participants in HUD's. VA also does not know to what extent HUD conducts any monitoring.

It is, of course, true that duplicative VA and HUD monitoring could have a detrimental effect on the Government's efforts to ensure fair housing. Two consecutive or concurrent reviews of a builder or broker, each by a different Federal agency, could be perceived as harassment and might damage interest in cooperating with the Government. However, elimination of duplication should be accomplished

[82] This deficiency is discussed in *To Provide. . .For Fair Housing*, pp. 233–35. It is also noted by the Housing Task Force of the Leadership Conference on Civil Rights in 1976 Hearings.

[83] R. C. Coon, Director, Loan Guaranty Service, Veterans Administration, interview, Nov. 2, 1977 (hereafter cited as Coon interview).

[84] VA comments.

[85] Coon interview. As of August 1978, there was some evidence that VA's attitude toward monitoring may have changed. VA noted that some civil rights review was included in its routine review of program participants. Specifically, VA stated:

> VA field station personnel routinely review the operations, including compliance with civil rights laws, of fee basis personnel and program participants. VA staff appraisers are required to perform a minimum of 5 percent on-site reviews of all appraisals made by fee appraisers to ensure that fee appraisers are conforming to VA's policies and procedures, including the valuation of property without regard to race, color, religion, sex or national origin. Builder compliance with the affirmative marketing certification requirements is assured through continuing on-site review by compliance inspectors. Field station staff are also required to frequently and regularly visit lenders which affords them the opportunity to assure that they are in compliance with VA policies and standards, including compliance with the lender fair housing certification requirements. On a routine basis field stations, pursuant to an established statistical sampling technique, review loan files, both approved and rejected, for conformity with VA program and civil rights requirements. VA comments.

[86] This problem is discussed in U.S. Commission on Civil Rights, *To Know or Not to Know, Collection and Use of Racial and Ethnic Data in Federal Assistance Programs* (1973), p. 61, and David Copus, "Long-Term Problems in Title VII Enforcement" (1976) (unpublished paper). Mr. Copus was formerly Director of the Special Investigation and Conciliation Division, U.S. Equal Employment Opportunity Commission.

[87] A recent nationwide study by the National Committee Against Discrimination in Housing (NCDH) emphasizes this point. One of the findings of that study was that "Quite often the black homeseeker is unaware that discrimination has occurred." For example, the NCDH noted that:

> In Oklahoma City, the black auditor was very impressed with the kindness and courtesy of the agent. "She seemed unbothered about showing me houses where no blacks apparently live," the auditor reported. However, the auditor didn't realize that although the downpayment mentioned to her for a particular house was 20 percent of the purchase price, the white auditor was told it was 10 percent. National Committee Against Discrimination in Housing, *Trends*, vol. 21, no. 3 (Fall 1977).

[88] *To Provide. . .For Fair Housing*, pp. 234–35.

through a coordinated effort to ensure fair housing enforcement in both HUD and VA programs. Abdication of responsibility by VA is not an effective substitution for coordination.

VA has not always been so vigorous in its opposition to a monitoring program. In April 1974 LGS was studying the feasibility of conducting a demonstration project to monitor the activities of sellers and brokers in selected locations.[89] LGS hoped that if the project were successful, it would be able to install a nationwide monitoring program in fiscal year 1975. However, the demonstration project was never undertaken and no nationwide monitoring was instituted. VA canceled its plans when it concluded that nationwide monitoring would cost approximately $1 million per year.[90] VA did not attempt to design a monitoring project that might have been accomplished on a smaller budget.

IV. Compliance Mechanisms

A. Data Collection

As of late 1977, VA compiled almost no data on the sex or marital status of participants in its programs and had not cross-tabulated racial and ethnic data by sex in order to identify the distinctive problems encountered by minority women.[91] VA did know that women were 1.9 percent of the veteran population but in fiscal year 1977 received only 0.7 percent of VA-guaranteed loans.[92] However, it had not compiled data to determine the cause of the discrepancy or to discover if similar discrepancies occurred in other Loan Guaranty Service programs.

VA also does not tabulate data on rejected applications. In 1974 VA indicated that it could expand its data system to include racial information on all applicants so that VA could assess minority participation rates in its programs.[93] This Commission described the expanded system as "a significant improvement." However, as of late 1977 it had not yet been implemented. Thus, in order to assess minority participation, VA had to rely on decennial census data from 1970, the only source of racial and ethnic data on the veteran population,[94] which was more than 7 years old. VA has stated that:

> The Central Office quality review team whose function is discussed above, is provided data on minority fee personnel and minority veteran participation at the field station scheduled for review when the participation level is particularly low in relation to either the program volume or potentially eligible minority veteran population.[95]

However, on the whole, VA has made poor use of its data to understand the reasons behind discrepancies. It has not used the data to target field stations for review on the basis of their performance. In recent years,[96] VA has not provided the results of its analyses to its field stations with an admonition that they accelerate their efforts to assure equal opportunity in the programs they operate, although the Washington LGS regularly communicates with the field offices through bulletins which comment on field office performance in other areas. The official in charge of data analysis has stated that he uses the data to determine if there are "irregularities," which he would then call to the attention of the Director of the Loan Guaranty Service. However, as of mid-January 1978, that official had never made any reports of irregularities to the Director.[97]

Despite these deficiencies, there are some observations that can be made about the operation of both VA's acquired property and guaranteed loan programs.

1. Acquired Property

The VA continues to keep racial and ethnic data in its acquired property programs, including data on property locations and race and ethnic origin of purchasers. There has been an increase in both minority and nonminority purchases in mixed neighborhoods. In 1977, 55 percent of white pur-

[89] Cleland letter.
[90] A black female applying for a loan may face double discrimination because of both her race and her sex.
[91] Cleland letter.
[92] This discrepancy could be the result of any number of factors, either alone or in combination. The following are only a few possibilities: disproportionately more female veterans than male veterans may prefer renting to homeownership; a significant proportion of married female veterans may live in homes for which the husband is the mortgagor; female veterans may have more difficulty than male veterans in obtaining loans.
[93] This is discussed in *To Provide. . .For Fair Housing*, pp. 246–47.
[94] Cleland letter and VA comments.
[95] VA comments.
[96] In November 1973, VA issued a letter to all field stations urging recruitment of minorities for fee personnel positions (LTR 26–73–4, Nov. 20, 1973). The letter did not impose goals or timetables nor did it contain reporting requirements. A February 1974 issuance reminded field stations to record the racial or ethnic characteristics of veterans receiving direct loans (DVB Circular 26–74–9, Feb. 28, 1974), and a circular issued in September 1974 reported data on minority participation in the guaranteed loan program for each field station (DVB Circular 26–74–38, Sept. 10, 1974). No circulars concerning equal opportunity have been issued to field stations since then. VA comments.
[97] Bruce Smith, Loan Guaranty Service, Veterans Administration, telephone interview, Jan. 19, 1978.

chasers, 65 percent of black purchasers, and 89 percent of Hispanic purchasers purchased VA-acquired properties in racially mixed neighborhoods.[98] It is VA's view that "comparing this 1977 data with [earlier data] indicates a considerable shift in the neighborhoods where buyers are purchasing VA acquired properties."[99]

However, the more salient result of VA's acquired property programs is that few minorities buy properties in all-white areas and few whites buy properties in all-minority areas. In calendar year 1976, for example, only 3.7 percent of black purchasers and 5.9 percent of Hispanic purchasers bought homes in white neighborhoods.[100] Similarly, only 4.6 percent of white purchasers bought homes in minority neighborhoods.[101]

The fact that these percentages are exceptionally low is emphasized by a comparison with data on neighborhoods in which minority veterans purchase homes with VA-guaranteed loans. In the loan guaranty program in 1976, 8.9 percent of all blacks and 18.6 percent of all Hispanics bought homes in all-white neighborhoods.[102]

2. *Direct and Guaranteed Loans*

In the direct loan program VA regional officials determine which eligible veterans qualify for the direct loans for which they are applying. It appears that VA officials do not treat minority applicants as favorably as they treat nonminority applicants. Indeed, it would seem that VA applies higher standards for minorities than nonminorities. For example, in the direct loan program, minority participation is inadequate. Minorities represent only 3.9 percent of the borrowers although they represent 5.6 percent of the population potentially eligible for direct loans.[103] Exhibit 4.3 shows:

- The average size loan to minorities is smaller than that for nonminorities.
- The average minority borrower's income, including spouse's income, is somewhat higher than that of nonminorities.[104]
- The average assets of minority borrowers are considerably larger than those of nonminorities.
- The average maturity (i.e., length of time for repayment) is shorter for minorities than for nonminorities.[105]

The extent to which there is a discrepancy between treatment of minorities and nonminorities in VA's direct loan program is accentuated by a comparison with the results in the loan guaranty program. In this program, where private lenders also play an important role in deciding who will receive loans, VA statistics reveal no major discrepancies in the treatment of minorities and nonminorities on a nationwide basis[106] (see exhibit 4.4.). In the loan guaranty program, minorities receive 16.2 percent of the loans.[107] In the guaranteed loan program there is little difference between the length of time provided for minorities and nonminorities to repay the loans. There is no major discrepancy in the average downpayment for minorities and nonminorities. As in the direct loan program, guaranteed loans to minorities are, on the average, smaller than loans to nonminorities. However, this is balanced by the fact that the average incomes and assets of minority borrowers are also smaller than nonminority borrowers.

[98] Cleland letter. In 1972 not more than 36 percent of all white purchasers bought VA-acquired property in mixed neighborhoods; 48 percent of all black purchasers and 72 percent of all Hispanic purchasers bought VA-acquired properties in mixed neighborhoods. VA defines a mixed neighborhood as "A street between intersections where the occupants on both sides of the street include whites and one or more minority families." *To Provide. . .For Fair Housing*, p. 245.

[99] Cleland letter.

[100] In 1972, 5 percent of black purchasers and 17.5 percent of Hispanic purchasers bought homes in all-white neighborhoods. *To Provide. . .For Fair Housing*, p. 245.

[101] Cleland letter.

[102] Ibid.

[103] VA comments.

[104] VA has stated:

> This observation on average minority veteran's income versus average nonminority veteran's income should be balanced with data on shelter expense as percent of income. Shelter expense as percent of income is a measure of where veterans opt to spend their income (shelter, other necessary expenses or luxury items) and an indication of whether veterans are financially over extending themselves to secure housing. Data provided to the Commission in the Administrator's letter of November 11 and reiterated below indicates that minority veterans elect to spend less on housing than nonminority veterans. VA comments.

Based on data which VA provided to this Commission, a comparison of the percentage of income spent by minority and nonminority veterans on shelter expense during calendar year 1976 shows that whites spent 32.4 percent of their income on shelter; blacks spent 29.7 percent; Hispanics 27.0 percent; Native Americans, 31.2 percent, and Asians, 15.2 percent. Ibid.

[105] According to the VA:

> [T]he data on average loan terms reflect the loan repayment period actually obtained, not necessarily one imposed by VA. Short economic life as established by an appraiser for an existing home or preference of a buyer for a 25 year rather than 30 year mortgage could account for the shorter average maturities for minority home purchasers using VA direct loans. VA comments.

[106] The Commission's analysis did not attempt to ascertain if there were discrepancies in individual banks or even within any State or local areas.

[107] VA has offered the comparison that data from the 1970 census showed that 11.0 percent of the veteran population is minority. Cleland letter.

EXHIBIT 4.3

Comparison of Black, Hispanic, and Nonminority Participation in VA's Direct Loan Programs, Calendar Year 1976

Group*	Number of direct loans	Percent of total direct loans**	Average down-payment	Average loan size	Average veteran income	Average borrower's income	Average borrower's assets	Average number of months for repayment
Black	45	1.8%	$3,594	$18,230	$9,032	$ 9,942	$6,273	280
Hispanic	24	1.0	2,885	16,969	9,577	10,004	4,016	270
White	2,364	96.1	1,276	19,709	9,219	9,319	2,573	290

*VA also collects data for American Indian/Alaskan Native and Asian/Pacific Islander veterans. These data are not included in this exhibit. The Commission believes that, due to the small size of the direct loan program, valid conclusions could not be drawn concerning these groups' participation in VA programs.

**In calendar year 1976, VA made 2,460 direct loans.

Source: Max Cleland, Administrator of Veterans Affairs, Veterans Administration, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Nov. 11, 1977.

EXHIBIT 4.4

Comparison of Black, Hispanic, and Nonminority Participation in VA's Guaranteed Loan Programs, Calendar Year 1976

Group*	Number of guaranteed loans	Percent of total guaranteed loans**	Average down-payment	Average loan size	Average borrower's income	Average borrower's assets	Average number of months for repayment
Black	34,147	10.6%	$447	$28,732	$11,271	$2,469	351
Hispanic	13,718	4.3	708	29,649	10,869	2,760	355
Nonminority	269,511	83.8	761	32,309	11,739	3,796	354

*VA also collects data for American Indian/Alaskan Native and Asian/Pacific Islander veterans. These data are not included in this exhibit. The Commission believes that due to the small size of the direct loan program, for the purposes of this report, valid conclusions could not be drawn concerning these groups' participation in VA programs.

**In calendar year 1976, there were 321,676 guaranteed loans made.

Source: Max Cleland, Administrator of Veterans Affairs, Veterans Administration, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Nov. 11, 1977.

B. Complaints

In August 1978 the VA sent this Commission a July 10, 1978, draft of revised housing discrimination complaint procedures, which VA states will "update policies and procedures for the processing and disposition of discrimination complaints."[108]

VA's current complaint procedures were written in 1965[109] and revisions are long overdue. The current procedures make no mention of processing complaints alleging discrimination on the basis of sex, marital status, age, or public assistance as a source of income. Moreover, since they are written pursuant to the Executive Order No. 11,063, they need even more updating than VA announced to this Commission. Almost 10 years after the passage of Title VIII, they have not been updated to reflect the passage of that title.[110]

The current procedures require that any complaint alleging discrimination in VA programs be submitted in writing to the local VA office. This requirement is so stringent[111] that it may exclude complaints from persons who cannot express themselves well in writing. Many complainants may first call and be refused assistance unless the written complaint is submitted. Thus, VA procedures can also effectively discourage complainants.[112]

Once VA receives a complaint, the steps it follows are not conducive to corroborating and correcting the discrimination which has been reported. If a complaint is filed with a local VA office, the office is then directed to request a reply from the person or entity against whom the complaint has been filed. The complainant is not contacted and no data or documents are requested from the lender. If the response is not statisfactory, the local VA office or central office may investigate the matter.[113]

The draft revised housing discrimination complaint procedures are a definite improvement over the current ones. They prohibit sex discrimination, allow telephone complaints if they are subsequently submitted in writing, and require that the complainant be contacted. Although the draft procedures inform the field stations, "The application of these policies and procedures requires a thorough knowledge of. . .the Equal Credit Opportunity Act, and Regulation B, as amended," the procedures do not list marital status, age, or receipt of public assistance as prohibited bases of discrimination.[114] Neither VA's current procedures nor its draft procedures contain standards for determining whether a lender's responses to complaints are mere excuses or rationalizations. VA field stations are left to their own devices to assess their adequacy.

If discrimination is found and the complaint cannot be resolved informally, VA officials are directed to make an adjustment satisfactory to the complainant. This may involve finding another source of lending or alternative housing. The solution obtained for the complainant need not involve the person or institution which created the problem. For example, VA officials could assist the complainant in buying a similar property in a location satisfactory to the complainant.[115] VA has observed:

> VA's first priority in resolving proven discrimination is to assist the complainant in securing that which he or she was seeking when the discrimination occurred. This may be a loan or a particular property, a particular location or a particular type of house. Having assisted the complainant in overcoming the effects of discrimination and thereby remedied the problem, VA then pursues positive action against the guilty party. Thus VA considers rectifying the situation the first order of business, and punishing the guilty party the second.[116]

However, when fair housing violations are found, VA's current procedures have no absolute requirement that they be corrected if the complainant can be appeased through some other means. VA's

[108] VA comments and Veterans Administration, Draft Interim Issue 26–78–7, July 10, 1978 (hereafter cited as Draft Interim Issue).

[109] U.S., Veterans Administration, *Procedure for Processing Discrimination Complaints* (1965) (hereafter cited as *VA Complaint Procedures).*

[110] Ibid., and Eleanor Harmon, Special Assistant to the Director, Loan Guaranty Service, VA, telephone interview, Jan. 19, 1978.

[111] In contrast, the Department of Housing and Urban Development has installed a "hotline" for telephone receipt of fair housing complaints.

[112] In a complaint alleging racial considerations in an appraisal, the complainants alleged that they attempted to complain by telephone and that VA refused to handle their telephone complaint without informing them of procedures for filing a written complaint. Subsequently, with the assistance of an attorney, the complainants filed a formal written complaint. The VA found no discrimination, closing the complaint without contacting the complainants to determine all the facts of the case. After intervention by the National Committee Against Discrimination in Housing, the complaint was reopened and the complainants were interviewed. After VA made another finding of no discrimination, the complainants filed suit against VA alleging that the VA had "failed and refused to take the minimum steps necessary, including the fair and full investigation of fair housing complaints to assure that VA designate appraisers and employees of VA do not base appraisals and determinations of reasonable value upon facts relating to race, color, or national origin in the administration of the loan guaranty program." Amy and William Hanson and the West MacGregor Protective Association v. the Veterans Administration, No. H-78–09 (S.D. Tex., filed Jan. 4, 1978).

[113] *VA Complaint Procedures.*

[114] Draft Interim Issue.

[115] *VA Complaint Procedures.*

[116] VA comments.

current procedures merely state, "Efforts will be made to obtain satisfactory assurances that the discrimination will be eliminated in the future."[117] VA's draft procedures also provide no standards for complaint resolution since this responsibility will be transferred to the central office and VA's draft procedures are addressed only to the field staff.[118]

VA does not encourage the filing of complaints with VA. For example, its fair housing poster makes clear how to file a housing discrimination complaint with HUD. In small print at the bottom of the poster, it also states that "If you are a VETERAN or your complaint concerns a property offered for sale with VA FINANCING, file your complaint with the closest VA Regional Office."[119] No information is provided as to how to determine the location of that office.

In response, VA has stated:

> HUD has the primary and broadest responsibility for enforcing fair housing. VA's responsibility for enforcing fair housing is limited to veterans, the operation of the Loan Guaranty program and participants in that program. The VA fair housing poster reflects this delineation of authority by advising all persons of HUD's role and subsequently advising veterans and persons seeking to purchase VA acquired properties of VA's role and interest. VA follows this same procedure with the lender certification poster requirements by providing flexibility to federally-regulated lenders. To wit, the VA fair housing poster had to be prominently displayed, however, if the financial regulatory agency required prominent display of its own fair housing poster the VA poster need not be posted as well. Thus VA subordinated VA's fair housing requirements to those imposed by the agency with the primary responsibility for supervising the lender.[120]

VA's observations have merit and could provide the basis for a Government-Wide approach to complaint procedures which would avoid duplicative investigation. However, no interagency mechanism for complaint handling exists. There is no system for informing VA or other appropriate agencies of complaints filed with HUD or the financial regulatory agencies. For a number of reasons, it is important that VA know about such complaints. If VA is to ensure that lenders participating in the guaranteed loan program do not practice discrimination, it is essential that VA know about complaints against these lenders. In addition, because HUD has no enforcement power, if VA is informed of discrimination complaints against lenders with which it does business, VA could utilize its leverage to eliminate discrimination by those lenders. Moreover, VA helps veterans to seek alternative sources of funding if they are discriminatorily denied loans, but it can only provide such assistance if it is aware of the veteran's complaint.

VA's complaint log lists only 48 complaints which came to the attention of the Loan Guaranty Service Equal Housing Opportunity Staff from January 1975 through mid-November 1977.[121] More than half of the complaints concerned, at least in part, the actions and policies of VA.[122] As of November 1977, only about 10 complaints in the log appeared to allege discrimination on the basis of race, sex, or national origin by lenders, brokers, or other participants in VA programs.[123]

Two complaints, both alleging racial considerations in an appraisal, appear to have been mishandled. In one case, the complainant alleged that the appraiser had taken the racial composition of the neighborhood into account and that, therefore, the appraisal was too low. VA reviewed the appraisal and raised it by $1,700.

In response to these observations, VA made the comment that:

> [one] out of 7 appraised values are appealed. Appraisals are appealed because they are lower than the selling price. Upon review of an appealed appraisal, the VA field station may increase the appraised value if the property merits it or it would be in the best interest of the

[117] *VA Complaint Procedures.*

[118] Draft Interim Issue.

[119] The poster states, "An aggrieved person may file a complaint of a housing discrimination act with the: U.S. Department of Housing and Urban Development, Assistant Secretary of Fair Housing and Equal Opportunity, Washington, D.C. 20410."

[120] VA comments.

[121] Ibid. See also "Housing Discrimination Complaints received by VA." Unless otherwise indicated, the information in the remainder of this section on complaints is taken from the VA complaint log (hereafter cited as VA complaint log). Not all of these complaints alleged discrimination on the basis of race, ethnic origin, or sex. For example, one complaint alleged age discrimination and another alleged discrimination against veterans as a class.

[122] VA complaint log.

[123] Where complaints alleged denial of loans, VA's complaint log did not always make clear whether the denial was due to decisions by the lender or by VA regional offices. VA has stated:

> The complaint log is not a complete history of a complaint. This observation should be balanced by the purpose of the log, which is an internal VA record for keeping track of pending complaints under investigation as well as an historical account of complaints. The log was never intended as anything other than a tickler listing of complaints for inhouse location of the complaint file. VA comments.

veteran. Whether an appraisal is increased and how much it is increased depends upon the particular circumstances of each case. Inasmuch as appraisals are estimates of market value VA does not reprimand an appraiser because an appraisal is appealed or an estimate is raised.[124]

It is also imperative that VA take appropriate action to ensure that racial considerations do not influence the appraiser's estimates.[125]

In the other case, the appraiser was alleged to have made racial inquiries while making an appraisal. The VA field station reminded the appraiser of the "VA policy in this matter" and issued a release to all appraisers listed with the field station. However, there was no indication that VA determined whether the racial considerations had an effect on the appraisal. VA's explanation was that, "In [this] complaint, there was no appeal of the appraised value, rather the appraiser's behavior was challenged and VA responded accordingly."[126] This explanation does not reflect adequate investigation of the complaint. Because VA did not ascertain whether race had been taken into account in making the appraisal, it did not determine whether it was necessary to take corrective action to ensure against future racially biased appraisals or if, after racial considerations were eliminated, the appraisal should have been increased.

VA's record with regard to complaints against its own offices revealed that, in some cases, discriminatory practices had been followed by those offices. For example, in one instance as late as 1975, the regional office had permitted a lender to request a woman to state her childbearing intentions, a request prohibited by Equal Credit Opportunity Act regulations.[127] In another case, in 1977, the regional office did not approve a loan because "there was not enough income in the area where the house is being purchased."[128] In both cases, the VA complaint log reveals that the regional office was operating contrary to VA policy. However, the log contains no indication that any procedures, such as regular reporting, were instituted to ensure that staff in the regional offices revised their practices to comply with VA policy.

It also appears that VA did not always investigate adequately complaints filed against its own field stations. For example, on two occasions complainants alleged that their offers to purchase VA-acquired property were refused because of their race. The VA regional offices involved, however, denied the allegations, and the complaint log notes that the regional offices "had gotten confused" with their advertising. Although this is a typical excuse realtors make when refusing to sell to minorities, the Washington office apparently did not investigate the cases further.

C. Sanctions

VA regulations permit action against most participants in VA programs who discriminate against veterans on the basis of race, color, religion, sex, or national origin. Specifically, VA procedures provide that:

- As part of a certificate of nondiscrimination, veterans receiving VA loans or guaranteed loans and purchasers of VA-acquired property must certify that they understand that "Civil action for preventive relief may be brought by the Attorney General of the United States in any appropriate U.S. District Court against any person" responsible for a violation.[129]
- The Administrator may suspend an appraiser from doing appraisals authorized by VA if the appraiser has "engaged in any practice detrimental to the interests of the veteran, the lender or the Government,"[130] or has been influenced "in any manner whatsoever by the race, color, religion, national origin, or sex of any person residing in the property or in the neighborhood wherein [the property] is located."[131]
- The Administrator may suspend a lender from obtaining guaranty of loans to veterans if the administration finds that the lender has engaged in practices unfair to veterans or has declined to make a guaranteed home or mobile home loan to "an eligible veteran because of the applicant's race, color, religion, sex, or national origin or has willfully or negligently engaged in practices

[124] VA comments.
[125] Although the exact nature of the appropriate corrective action might depend upon the circumstances of the civil rights violation, such actions might include: informing the appraiser of VA's standards and requiring the appraiser to sign an assurance that those standards will be followed; suspending the appraiser from VA's programs; or denying the appraiser the opportunity to participate in those programs.
[126] VA comments.
[127] 12 C.F.R. § 202.5(h) (1977).
[128] VA complaint log.
[129] 38 C.F.R. § 36.4363(d) (1977); VA Forms 26-6921 (June 1977); 26-1802(a) (June 1977); and 26-6705 (December 1975).
[130] 38 C.F.R. § 36.4341 (1977).
[131] VA Form 26-1803 (November 1977).

otherwise detrimental to the interests of veterans or of the Government."[125] While this provision does not specifically reflect the passage of the Equal Credit Opportunity Act, VA has written to this Commission that ". . .VA considers that the latter part of the citation is sufficiently broad to encompass violations of ECOA as weli as all other recent consumer protection laws. Thus VA has the power to suspend lenders proven to be in violation of ECOA."[126]

- Brokers may be barred from selling, renting, or managing VA-owned property because either VA or HUD has found failure to comply with fair housing laws or the joint HUD–VA certification of nondiscrimination.[134]
- The Administrator may refuse to appraise a dwelling for a builder or seller if the Administrator finds that the party may be involved in the construction or sale of the dwelling and has engaged in practices unfair to veterans or has "declined to sell a residential property to an eligible veteran because of race, color, religion, sex, or national origin."[135]
- The VA can refuse to do site or subdivision analysis for any builder or developer requesting approval of sites unless the builder or developer certifies "that neither it nor anyone authorized to act for it will decline to sell any property included [in the analysis] to a prospective purchaser because of his or her race, color, religion, sex or national origin."[136]
- The Administrator may suspend a mobile home park operator from VA programs if the Administrator determines that the operator has engaged in practices which are unfair or prejudicial to veterans.[137] VA notes that it "considers that any form of discrimination would definitely be a 'practice' which would be unfair and prejudicial to the veteran."[138]

VA regularly receives a list of participants in Department of Housing and Urban Development programs who were suspended for various reasons. Few if any of these suspensions concern fair housing violations.[139] With no further investigation, VA is also likely to suspend these participants from VA programs.

VA has no procedures for applying sanctions and no procedures which detail the steps the Administrator and other VA officials must take when participants in VA programs will not voluntarily correct fair housing violations or comply with the nondiscrimination certifications which they have signed in the loan guaranty program.[140] VA procedures neither require suspension under such circumstances nor dictate correction of the violations which have been found.

Although VA frequently suspends program participants for other than civil rights reasons, it does not appear that VA has ever suspended a participant for violation of a civil rights requirement. VA's system of recordkeeping makes it difficult to be certain, however. VA does not tabulate the number of persons or organizations that have been suspended from its program, and it does not have a list of participants suspended for civil rights reasons.[141]

There have been instances in which participants in VA programs have not been suspended when there has been clear evidence that they engage in discriminatory housing activities which they will not correct voluntarily. In 1976 the Department of Justice had lawsuits pending against five realty companies which were participants in VA's acquired property programs.[142] Although this was called to the attention of VA, VA took no action.

[125] 38 C.F.R. §§ 36.4216 and 4331 (1977).
[126] VA comments.
[134] VA Form 26–8138 (August 1975).
[135] 38 C.F.R. § 36.4361(a) (3)(1977).
[136] 38 C.F.R. § 36.4363(c) (1977).
[137] 38 C.F.R. § 36.4235(a) (1977).
[138] VA comments.
[139] The list HUD provides to VA contains no statement of the reason for suspension from HUD programs. HUD officials were unaware of any suspensions for civil rights violations. George Pluto, Director of the Records and Information Division, Office of the Inspector General, Department of Housing and Urban Development, telephone interview, Feb. 9, 1978.
[140] VA notes, however, that it has procedures "for notifications and hearings" in its programs to assure equal employment opportunity in federally-assisted construction contracts. VA comments.
[141] In August 1978 VA officials estimated that about 25 of VA's approximately 5,000 fee appraisers had been suspended since 1976. VA comments. The most common reason that these appraisers were suspended was for "failure to show professional competence." George Moerman, Assistant Director for Loan Policy, Loan Guaranty Service, and Lyman Miller, Assistant Director for Construction and Valuation, Loan Guaranty Service, Veterans Administration, telephone interviews, Jan. 12, 1978. VA estimates that it suspends about 20 to 40 of its approximately 40,000 management and sales brokers each year. The most frequent reasons for suspending brokers are for "failure to fill commitments" and fraud. In one instance in 1977, VA refused to comply with a broker's request for a property appraisal. VA officials estimate that 14 lenders were suspended between 1972 and 1977. The most common reason for suspending lenders was failure to follow procedures, such as failure to complete the required forms. VA officials also estimate that each year about 40 to 60 builders are suspended from VA programs because of the quality of their construction or their failure to fulfill contractual obligations. Moerman and Miller telephone interviews.
[142] 1976 Hearings, p. 7. Among the violations found by the Department of Justice were: ". . .steering," making statements indicating racial preference and discrimination re the sale of homes, assigning sales personnel to deal with persons of their own race and to show homes inhabited by residents of their own race." Ibid.

Moreover, as of late 1977, VA had not instituted any procedures to ensure that it would learn of the suits the Department of Justice files.

VA informed this Commission that it has not independently initiated an administrative action against the five realty companies because "VA accords a presumption of innocence until proven guilty. Hence VA takes appropriate administrative action against a program participant when the participant has been proven or adjudged guilty."

There is precedence in closely related areas of civil rights law, however, for temporarily suspending from Federal programs those participants who *prima facie* have failed to comply with civil rights requirements during the pendency of administrative proceedings.[143] A Department of Justice lawsuit is indicative of a *prima facie* case of discrimination.[144] Moreover, even if VA is unwilling to accept the Department of Justice's findings, it could initiate an investigation independently to determine whether or not it should initiate administrative action against a participant.

V. VA Services

A. Application Forms and Rejection Notices

VA has not taken adequate precaution to ensure that the forms it uses are in compliance with the requirements of Regulation B—the regulation of the Federal Reserve Board which explains to creditors how to comply with Equal Credit Opportunity Act. In setting requirements for loan application forms, Regulation B states that, "only the terms 'married,' 'unmarried,' and 'separated' shall be used. . . ."[145] This provision of Regulation B went into effect October 28, 1975.[146]

As of January 1978, however, more than 2 years after the effective date of Regulation B, VA was still using some forms which made detailed, prohibited inquiries as to marital status. For example, the VA home counseling analysis asks veterans to indicate if they are divorced.[147] The VA application for a loan guaranty to purchase a mobile home asks veterans to indicate if they are widowed or divorced.[148] The VA Washington office has informed its field stations that the forms must be individually altered before they are used,[149] but this requirement is not monitored and, as of December 1977, the uncorrected mobile home loan form was still in circulation.[150] In August 1978, VA informed this Commission that, "A revised mobile home loan application form was released March 1978. The time lag was due to major revisions in the format of the application form, of which the ECOA changes were but a minor part."[151] VA did not, however, state that it had revised its home counseling form.

VA's notices of denial of loan applications issued in March 1977 also do not appear to comply with Regulation B. Regulation B directs creditors to explain to rejected applicants the reasons for the rejection. Regulation B states that:

> A statement of reasons for adverse action shall be sufficient if it is specific and indicates the principal reason(s) for adverse action. A creditor may formulate its own statement of reasons. . .or may use all or a portion of the sample form printed below. . . .[152]

VA's disapproval notice for guaranteed loans permits VA to state merely that "the information available to us does not establish the veteran as a satisfactory credit risk," without explanation, and informs the veteran of the credit bureau which prepared the report.[153]

VA has commented:

> VA's authorizing statute provides only two bases for the denial of loan benefits for credit-related reasons. This Section, 1810(b) of Title 38, U.S. Code, stipulates "No loan may be guaranteed [or made by VA]. . .unless. . .the

These five companies had been identified as participants in VA programs by a cursory review of Department of Justice lawsuits. No exhaustive review of all VA program participants was conducted.

[143] Under Title VI of the Civil Rights Act of 1964, Federal agencies can defer funding on the basis of a *prima facie* finding of a Title VI violation. This issue is discussed in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. VI, *To Extend Federal Financial Assistance* (1975), pp. 376–77.

[144] The Housing and Credit Section of the Department of Justice requires that a fair housing case be practically airtight before it will litigate that case. In the 10 years of its existence that Section has filed more than 300 lawsuits and lost only 1 case on the merits. For a further discussion of the Department of Justice's efforts, see the chapter in this report on that agency.

[145] 12 C.F.R. § 202.5(d)(1) (1977).

[146] 12 C.F.R. §§ 202.4(c)(2) and 202.14 (1976). This provision is superceded by § 202.5(d)(1) in Regulation B which also provides that the creditor may use the term "unmarried" to include single, divorced, and widowed persons.

[147] VA Form 26–8170 (July 1974).

[148] VA Form 26–8641 (April 1975).

[149] DVB Circular 26–77–7, Apr. 15, 1977.

[150] VA Form 26–8641 (uncorrected) was obtained from VA in December 1977.

[151] VA comments.

[152] 12 C.F.R. § 202.9(b)(2) (1977).

[153] VA Form FL 26–599 (March 1977). Similarly, the disapproval notice for a direct loan allows the VA to state merely that "information developed during the processing of your application prevents us from making a determination that you are a satisfactory credit risk." VA Form FL 26–506 (March 1977).

> contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses [and] the veteran is a satisfactory credit risk. . . ." The notices of disapproval used by VA specify reasons for denial which correspond closely to the statutory cases. VA therefore believes that the notices comply with Regulation B in that they indicate the only "principal reason(s) for adverse action" permitted under Title 38.[154]

However, in the view of this Commission, VA's disapproval notices for guaranteed and direct loans fail to provide sufficiently specific reasons for the disapproval. For example, although VA may deny a loan to an applicant because it cannot establish that the applicant is a satisfactory credit risk, there may be any number of factors which contribute to such a determination. For example, the VA might be unable to verify the applicant's residence or income or it might find that the applicant had no credit file. It might also discover that the person had insufficient income or delinquent credit obligations. In contrast to VA's rejection forms, the sample rejection form in Regulation B lists all of these factors among many others as possible explanations to be given for credit denials.[155]

The model statement of credit denial in Regulation B also provides space for creditors to provide the name of any outside source of information upon which they relied in making their determination of creditworthiness.[156] VA does not inform the applicant whether it is possible to request from the VA reasons for rejection as specific as those suggested in Regulation B. Without such information, however, it may be difficult for an applicant to determine if any discrimination has occurred in violation of the Equal Credit Opportunity Act. Thus, the effect of these forms could be to insulate VA, inappropriately, from challenges to field station action where the stations have discriminatorily denied loans to minorities or women.[157]

B. Advertising in Minority Media

VA continues to require field stations to advertise the sale of acquired properties in the minority media.[158] Brokers participating in such VA property management activities are also required to use minority media when advertising these properties in predominantly nonminority areas.[159] According to the VA:

> The goal of field station advertising in the minority media is to ensure that minority persons are advised of acquired properties in predominantly white areas in order to afford them the fullest possible opportunity for submitting offers on all housing offered for sale.[160]

To assist field stations in identifying minority media and to initiate an advertising program, in 1973 the VA compiled and published a *Minority Media Directory.* VA has directed its field stations to keep the initial listing of minority media within their jurisdictions updated (see paragraphs 4 and 5). Thus field stations, which are responsible for advertising in the minority media, are responsible for maintaining a current directory of minority media within their jurisdictions.[161]

During fiscal year 1977, field stations spent $168,115 on minority media advertising.[162] In the quarterly reporting period ending in September 1977, field stations reported spending $38,000 on such advertising.[163]

C. VA Use of Minority Brokers, Appraisers, and Inspectors

Minority participation as sales brokers in VA's acquired property program is substantial (see exhibit 4.5). In fiscal year 1977, minorities, who constituted 22.2 percent of the sales brokers in that program,

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[154] VA comments.
[155] 12 C.F.R. § 202.9 (1977).
[156] *Id.*
[157] Two attorneys at the Federal Trade Commission (FTC), the compliance agency for the VA under ECOA, examined these forms. They stated that, in their view, the explanations VA offers for rejecting loan applications are not sufficiently specific to meet the requirements of Regulation B. Jean Noonan and Meryl Randal, attorneys, Special Statute Section, Federal Trade Commission, interview, Dec. 5, 1977.
VA responded:
> VA records indicate that copies of these forms were provided to Ms. Jean Noonan of that agency on January 4, 1978, in response to a request by Mr. Lewis Goldfarb, Director, Division of Special Statutes, Bureau of Consumer Protection, FTC. FTC has specific enforcement authority under ECOA with regard to the Veterans Administration. VA has received no formal response from the FTC that the VA disapproval notice is not in compliance with ECOA or Regulation B. VA comments.

However, an FTC attorney stated that FTC has notified VA of its staff opinion by telephone. Jean Noonan, FTC, telephone interview, Sept. 19, 1978.
[158] DVB Circular 26-73-32 (Aug. 24, 1973).
[159] Ibid.
[160] Ibid.
[161] VA comments.
[162] Cleland letter.
[163] Eleanor Harmon, Special Assistant to the Director, Loan Guaranty Service, VA, telephone interview, Dec. 15, 1977.

received $3.6 million in sales commissions paid by VA to all sales brokers.[164]

The amount of business given to minority management brokers nationwide is appreciable. As shown in exhibit 4.5, minority management brokers received 24.2 percent of the management fees paid to all VA management brokers in 1977. However, minority representation as VA management brokers remained low, increasing from 3.3 percent in 1974 to only 4.7 percent in 1977. In some States the lack of minority management brokers is especially apparent. For example, Arkansas, Delaware, and Mississippi were among the 19 States with no minority management brokers in 1976. Arizona, Illinois, and New York were States with large Hispanic populations which had no Hispanic management brokers in 1976.[165]

Minority participation as appraisers and compliance inspectors[166] is generally low (see exhibit 4.5). In 1977 only 4.0 percent of all VA fee appraisers and 2.3 percent of all VA inspectors were minorities, a modest increase since 1974.[167] In 1976 there were 19 States with no minority appraisers or inspectors.[168] Few of the 12,068 brokers, appraisers, or inspectors in VA programs were Native American or Asian American. In 1976 only 31 were Asian American and only 19 were Native American.[169]

In January 1977, VA began collecting data on the sex of brokers, appraisers, and inspectors in its loan guaranty program. For calendar year 1977, females were 2.0 percent of all appraisers, 0.4 percent of all inspectors, and 4.5 percent of all management brokers.[170]

D. Counseling

The VA continues to offer a counseling service to veteran home buyers.[171] According to VA:

> The objectives of counseling are to improve the opportunities for minority persons to become homeowners and to increase the probability that such persons, after obtaining VA guaranteed or portfolio loans, will discharge their responsibilities as mortgagers and homeowners. The attainment of the objectives will be undertaken by affording minority persons the chance to meet and discuss their needs and plans to buy or build homes with qualified VA officials and staff personnel, to learn about properties for sale, to have assessments made in respect to their capabilities of acquiring homes, to receive direct assistance in locating homes and negotiating loans, and to be informed of the responsibilities associated with homeownership and mortgage debt.[172]

Field stations are instructed to provide counseling services in cities with "concentrations of minorities. . .amounting to 25,000 or more persons."[173] The counseling program is directed toward minorities who:

- Are buying homes for the first time;
- Are unaware of responsibilities inherent in homeownership;
- Need financial planning assistance; or
- May be in low-income categories.[174]

Commendably, the program is open to both minorities and nonminorities. Indeed, in the first quarter of 1977, almost half of the 1,593 persons counseled were not minorities.[175] Although women often face special difficulties in becoming homeowners, and thus might have an interest in the counseling VA offers, VA did not report the sex of those counseled.

As of March 19, 1977, counseling services were available at 22 cities throughout the United States,[176] but there were no veterans counseled in some of

[164] This represents an increase since 1974. In June of that year only 20.6 percent of VA's 1,912 sales brokers were minorities. R. C. Coon, Director, Loan Guaranty Service, VA, memorandum to David Pales, equal opportunity specialist, Jan. 16, 1978.

[165] 1976 Hearings, pp. 98–102. The VA referred this Commission to these hearings as a source of information on management brokers. Cleland letter. The other 16 States were Alaska, Hawaii, Iowa, Maine, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and Wyoming.

[166] Compliance inspectors are used by VA to assure that construction is in substantial compliance with VA-approved plans.

[167] Cleland letter. In 1974 only 2.9 percent of all fee appraisers and 1.4 percent of all inspectors were minority. *To Provide. . .For Fair Housing*, p. 257.

[168] These States were Alabama, Alaska, Arkansas, Connecticut, Delaware, Idaho, Iowa, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. 1976 Hearings.

[169] 1976 Hearings, pp. 98–102.

[170] VA comments. VA provided this information in its August 1978 response. It is, therefore, not included in the tables found in this report.

[171] See *To Provide. . .For Fair Housing*, pp. 263–65, for a discussion of the program.

[172] DVB Circular 26–73–19 (June 27, 1973) and attached guidelines.

[173] Ibid.

[174] Ibid.

[175] During that quarter, there were 747 whites counseled; 720 blacks; 119 Hispanics; 4 Native Americans; and 3 Asian Americans. U.S., Veterans Administration, *VA Home Counseling Report*, RCS 26–81 (Mar. 31, 1977) (hereafter cited as *VA Home Counseling Report*).

[176] Counseling services were available at the following cities: Phoenix, Ariz.; Los Angeles, Calif.; San Francisco, Calif.; St. Petersburg, Fla.; Atlanta, Ga.; Chicago, Ill.; Indianapolis, Ind.; New Orleans, La.; Boston, Mass.; Baltimore, Md.; Detroit, Mich.; St. Louis, Mo.; Winston-Salem, N.C.; Newark, Del.; Buffalo, N.Y.; Cleveland, Ohio; Philadelphia, Pa; Pittsburgh, Pa.; Nashville, Tenn.; Houston, Tex.; Waco, Tex.; and Milwaukee, Wis. These offices spent varying amounts of time with each counselee. While an average of 30 minutes per veteran was spent by all 22 counseling centers, three centers reported spending less than 15 minutes per person during this period. *VA Home Counseling Report*.

EXHIBIT 4.5

Minority Participation as Brokers, Appraisers, and Inspectors, Fiscal Year 1977

	Total participants	Minorities as a percent of total participants	Blacks as a percent of total participants	Hispanics as a percent of total participants	Fees received by minorities (in thousands of dollars)	Fees received by minorities as a percent of total fees
Management brokers	2,230	4.7%	3.8%	0.8%	969	24.2
Sales brokers	2,203	22.2	18.0	3.1	3,600	19.4
Fee appraisers	5,600	4.0	2.5	1.2	2,500	6.0
Inspectors	1,700	2.3	1.0	0.8		

Source: Max Cleland, Administrator of Veterans Affairs, Veterans Administration, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Nov. 11, 1977.

those cities. For example, in the first quarter of 1977, no persons were counseled at the Atlanta, Chicago, Nashville, and Waco field stations.[177] VA prepares a quarterly report on the counseling program, but this report is not sufficiently detailed to indicate the reasons for low participation in these areas[178] or the extent to which the counseling program has been helpful to those who do participate.

Although minority and female veterans may often benefit from guidance as to how to identify illegal discrimination and what steps to take if they believe it has occurred, the topic of discrimination was covered in only 57 of the 1,593 counseling sessions held during the first quarter of 1977.[179]

[177] Ibid. VA observed that "Low veteran and participation in the counseling program is difficult to explain since participation is entirely voluntary and must be sought by the veteran." VA comments.

[178] VA noted that:

> One measure of the effectiveness of counseling is the number of approved loans resulting. In CY 1977, 6,666 veterans were counseled at 22 field stations and of those counseled, 442 loans were approved during the same period, or approximately 7 percent of all veterans counseled were able to qualify for VA guaranteed loans. The only measure missing is the number of counselees who will apply for and secure VA guaranteed loans in 1978 or 1979, when their income is sufficient or their credit history is established or improved. VA comments.

However, this does not appear to be an adequate measure of the effectiveness of the counseling program since it is not compared with information on the success of veterans in obtaining loans in the absence of a counseling program.

[179] Ibid. Other components of counseling sessions may include location and neighborhood, price range, and monthly payments.

Chapter 5

DEPARTMENT OF AGRICULTURE

Farmers Home Administration

Summary

The Farmers Home Administration (FmHA) in the Department of Agriculture (USDA) provides loans and grants for rural development activities. In fiscal year 1977, more than 40 percent of its funds were spent on loans to assist single families to purchase or rehabilitate homes and on loans to assist builders in the construction of low- and moderate-income, multiple-family housing. Housing discrimination against applicants and participants on the basis of race, color, religion, sex, national origin, or marital status is prohibited in all FmHA loan programs.

However, several deficiencies in FmHA's fair housing program prevent its fully effective operation. FmHA has allocated too few staff to the enforcement of prohibitions against housing discrimination in FmHA programs. Fair housing enforcement is the responsibility of two permanent employees, referred to as the Administrative Staff for Equal Opportunity, in the Office of the FmHA Administrator, and neither spends more than halftime on fair housing activities.

FMHA has initiated a data collection system for measuring minority participation in its housing programs, but FmHA does not collect data on the sex of its program participants. Moreover, FmHA does not collect data by race and national origin on the terms under which FmHA loans are offered, nor does it determine the racial and ethnic composition of the neighborhoods in which borrowers purchase homes.

The proportion of FmHA housing loans to blacks has decreased from 19.6 percent of all loans in 1972 to 9.5 percent in 1976. During this period, the rate of loan rejections has increased for whites, blacks, and Hispanics, but the greatest increase in rate of rejection has been for blacks. FmHA has not conducted a study to determine why the disproportionate decline in loans to blacks has occurred.

USDA has a targeting system to promote equal opportunity in its programs, but this system needs improvement. USDA requires FmHA, as well as all other USDA agencies, to set targets for minority participation in its programs, but there is no requirement for setting targets for female participation. The targeting procedure has been ineffective because targets have sometimes been set below performance levels as well as below those targets set for the preceding year. Moreover, FmHA has no adequate procedures to evaluate the targets or to assess compliance with the targets.

FmHA requires most developers, builders, and real estate brokers participating in its programs to develop affirmative marketing plans that commit the signers to practice equal opportunity affirmatively in the sale and rental of housing covered by the plans. However, FmHA does not monitor compliance with this requirement.

Indeed, FmHA does not have an adequate program for conducting reviews of its programs to determine compliance with civil rights requirements. In the more than 2,000 reviews that have been conducted since 1976, only one fair housing violation has been found, although there is substantial independent evidence that many FmHA-funded projects are segregated by race. FmHA staff who carry out the day-to-day operations of the FmHA

housing programs are often responsible for conducting compliance reviews, but these staff have received little or no training in conducting compliance reviews. The reviews are generally too cursory.

This Commission is pleased to note, however, that FmHA hopes to correct many of these problems. In August 1978, the Administrator of FmHA commented:

> FmHA will acknowledge at the outset that there are varying degrees of justification for the majority of comments contained in the report.
>
> FmHA appreciates the Commission's efforts and comments and will use the report as a guide in correcting, to the degree possible, the criticisms and program deficiencies noted.[1]

I. Program and Civil Rights Responsibilities

A. Program Responsibilities

The Farmers Home Administration in the Department of Agriculture is responsible for providing loans and grants for a variety of rural development activities, including soil and water conservation, recreation, flood prevention, community facilities, and rural industrialization.[2] Housing assistance programs comprised nearly half of FmHA's total expenditures for fiscal year 1977.[3] Of the amount spent on housing assistance, 99 percent of the funds were spent for two programs:[4] rural housing loans, which enable single families to purchase or rehabilitate homes, and rural rental housing, which enables builders to construct multiple-family housing for low- and moderate-income families.[5]

1. Rural Housing Loans (Section 502)

This "single-family" program under Section 502[6] provides loans for low- and moderate-income families without adequate housing to buy or build housing or to repair or rehabilitate existing dwellings.[7] In fiscal year 1977, 60 percent of rural housing funds were used to buy new housing.[8] Loans are made directly to homeowners or home buyers, but homebuilders or others may be instrumental in aiding potential homeowners to apply for loans. In fiscal year 1977, FmHA made 118,632 rural housing loans.[9]

2. Rural Rental Housing (Sections 515 and 521)

Under these "multiple-family programs," loans are available to individuals, nonprofit or limited profit organizations (Section 515), or cooperatives (Section 521) to build or rehabilitate rental housing for low- and moderate-income families or senior citizens.[10] Loans are made for up to 40 years (50 years for housing for senior citizens).[11] The ultimate beneficiaries of these loans are the tenants themselves.

A number of entities, including segments of the real estate industry, participate in FmHA's housing assistance programs. They include:

- *Builders or developers.* Persons who build housing for sale to eligible FmHA buyers, including subdivision developers, benefit from FmHA programs by having a ready market for

[1] Gordon Cavanaugh, Administrator, FmHA, USDA, comments concerning the report of the Commission on Civil Rights, Aug. 18, 1978, attachment to Wallace letter (hereafter cited as Cavanaugh comments). USDA wrote to this Commission:

> Thank you for the opportunity to comment on your draft report on Fair Housing. The Farmers Home Administration and our Office of Equal Opportunity have reviewed the material. The comments of each are contained in the two enclosures to this letter.
>
> The Farmers Home Administration (FmHA) has commenced a major overhaul of all its regulations in order to provide for fair housing and to comply with equal credit opportunity requirements. The Office of Equal Opportunity has already completed a detailed analysis of FmHA regulations for this purpose. Joan S. Wallace, Assistant Secretary for Administration, USDA, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 22, 1978. (hereafter cited as Wallace letter).

Further, USDA's Office of Equal Opportunity wrote to this Commission, "Overall, the draft report fairly reflects the rural housing programs sponsored by the Department of Agriculture. Our comments will be related to material on specified pages of the draft." Richard J. Peer, Chief, Compliance and Enforcement Division, comments on the fair housing report draft of USCCR, Aug. 21, 1978, attachment to Wallace letter (hereafter cited as Peer comments).
Specific comments from FmHA and the Office of Equal Opportunity are included throughout this report.

[2] U.S., Office of Management and Budget, *Catalogue of Federal Domestic Assistance*, 1977 and 1977 Update, § 10.404–10.425.

[3] Total FmHA expenditures for fiscal year 1977 were $7.2 billion, of which $3.1 billion (43.5 percent) were for housing assistance. James Bryan, Chief, Reports Management Division, FmHA, telephone interview, Feb. 1, 1978 (hereafter cited as Bryan telephone interview, Feb. 1, 1978).

[4] A third program with potential significance is the rent subsidy program, which subsidizes rents of low-income persons. Beneficiaries of this program pay no more than 25 percent of their income for housing, and FmHA makes up the difference between this and actual market rents. Although this program was authorized in 1974 (42 U.S.C. § 1490 (a)(2)(A) (Supp. V 1975), its implementation was at the discretion of the Secretary of Agriculture, and it was not put into effect until late 1977. 42 Fed. Reg. 59052 *et seq.* (Nov. 15, 1977) [FmHA Instruction 44.5]. In 1976 FmHA signed a memorandum of understanding with the Department of Housing and Urban Development by which HUD would provide rent subsidies under Section 8 of the Housing Act of 1937 to eligible tenants in certain FmHA-financed projects (41 Fed. Reg. 51,584 (1976)) (to be codified in 7 C.F.R. § 1822, Subpart D, Exhibit P).

[5] Bryan telephone interview, Feb. 1, 1978.

[6] Section numbers refer to sections of the National Housing Act of 1949 and amendments.

[7] 42 U.S.C. §§ 1471–1472, 1474 (1970).

[8] Bryan telephone interview, Feb. 1, 1978.

[9] Ibid.

[10] 42 U.S.C. §§ 1485, 1490a (1970).

[11] 7 C.F.R. § 1822.87 (1977).

their homes. Such developers may, prior to construction of homes, obtain commitments from the Farmers Home Administration that a specified amount of money will be available to eligible buyers at the time of completion. While FmHA must honor those commitments, the developer may sell the homes to any buyers, regardless of FmHA eligibility. The commitments are often used as a selling point to obtain mortgage money from conventional sources.[13]

• *Individuals or nonprofit organizations.* These people may obtain FmHA loans to build or sponsor the building of rural rental housing for eligible low- and moderate-income renters.

• *Packagers.* Packagers are developers, technical assistance groups, or others who help eligible applicants apply for FmHA loans.

• *Real estate agents.* Real estate agents are used by FmHA to resell the properties it acquires through mortgage foreclosures when the loans it makes are not repaid. While FmHA field staff may handle these sales entirely, they usually place them on a multiple listing service or turn them over to a real estate company to sell.[14]

B. Civil Rights Responsibilities

All programs operated by FmHA are subject to civil rights requirements which bar discrimination. Specifically, under Department of Agriculture regulations, no FmHA employee may discriminate against housing assistance applicants on the basis of race, color, religion, sex, national origin, or marital status.[15] Furthermore, these regulations state that no recipient of FmHA assistance, such as a builder or developer, may discriminate on the basis of race, color, or national origin in the services provided with FmHA funds.[16] The specific laws and Executive orders which apply are:

• *Title VIII of the Civil Rights Act of 1968.* Title VIII prohibits discrimination on the basis of race, color, religion, sex, or national origin in the sale, rental, or financing of most housing.[16] FmHA staff and loan recipients are covered by Title VIII.

• *Executive Order No. 11,063.* This order requires Federal agencies to "take all action necessary and appropriate to prevent discrimination" on the basis of race, color, creed, or national origin in the sale of federally-assisted housing.[17]

• *Equal Credit Opportunity Act (ECOA).* No creditor may discriminate against an applicant on the basis of race, color, religion, national origin, sex, marital status, age, or because the applicant receives public assistance income.[18] As the direct loan maker, FmHA itself is a creditor and may not practice discrimination.[19]

• *Title VI of the Civil Rights Act of 1964.* Title VI prohibits discrimination on the basis of race, color, or national origin in the operation of any program receiving Federal financial assistance.[20] All FmHA loans which are not made directly to homeowners are covered by Title VI, including rural rental housing loans and rural cooperative housing loans.[21]

II. Organization and Staffing

A. Program Assignments

The FmHA Washington office develops policies and procedures for and monitors the operation of FmHA programs. Overall responsibility for FmHA programs rests with the Administrator.[22] However, the Assistant Administrator for Rural Housing[23] is responsible for developing policies to carry out the FmHA housing programs.[24] Reporting to the Assistant Administrator are the Single Family and Multiple Family Housing Loan Divisions, which develop and recommend operating plans and procedures for rural housing loans and oversee the administration of those loans.[25] An Operations Review Staff, responsible directly to the Deputy

[13] James Wiseman, Rural Housing Loan Specialist, Single Family Loan Division, FmHA, interview, Dec. 12, 1977 (hereafter cited as Wiseman interview).
[14] R.M. Yates, Director, Property Management Staff, FmHA, interview, Dec. 7, 1977 (hereafter cited as Yates interview).
[15] 7 C.F.R. § 1901.202(b) (1977).
[16] 7 C.F.R. § 1901.202(a) (1977).
[17] 42 U.S.C. § 3604 (Supp. V 1975). The coverage of Title VIII is discussed in detail in the chapters in this report on the Department of Housing and Urban Development and the Department of Justice.
[18] Executive Order No. 11,063, 3 C.F.R. 652 (1959–63 Comp.).
[19] 15 U.S.C. § 1691–1691f (1976).
[20] 15 U.S.C. § 1691a(e) (1976).
[21] 42 U.S.C. § 2000d (1976).
[22] 7 C.F.R. § 1901.204(a) (1977).
[23] 7 C.F.R. §1800(a) (1977).
[24] Responsibilities of this position are set forth in 7 C.F.R. § 1800.2(c) (1977).
[25] According to USDA regulations, "The Assistant Administrator provides leadership, formulates and coordinates policies in carrying out the Single and Multiple Family Housing Loans assigned to the Agency. He evaluates program effectiveness and analyzes needs and trends." 7 C.F.R. § 1800.2(c)(1) (1977).
[26] According to USDA regulations, "The Single Family Housing Loan Division develops and recommends operating plans and procedures for rural housing loans to individuals. . .and conditional commitments to builders and sellers for single family dwellings. This division is responsible for overseeing the administration of these loans. It inspects and evaluates the administration of Agency programs executed by FmHA State and County Offices." 7 C.F.R. § 1800.2(h)(1) (1977). Similarly, the regulations

Administrator, monitors the execution of all FmHA programs by FmHA staff at the State and local levels.[28] However, the Operations Review Staff does not evaluate the execution of civil rights requirements in FmHA programs.

The Property Management Staff, who also reports to the Deputy Administrator for Program Operations, is responsible for acquiring, either by foreclosure or voluntary conveyance, property of borrowers who default on their loan repayments.[29] Once the property has been acquired, the Property Management Staff is also responsible for managing and reselling it to eligible buyers through FmHA county staff.[30]

Implementation of FmHA programs is the responsiblity of FmHA field staff in 42 State offices[31] and about 1,750 county offices.[32] State offices typically have about 30 employees distributed in four major program divisions, one of which is Housing Programs.[33]

County offices are directed by a county supervisor and are staffed with up to eight assistant county supervisors who receive applications for loans, service loans,[34] and generally carry out the programmatic functions of the agency.[35] They report to the State office through district directors, who are responsible for 7 to 10 counties.[36] It is the county supervisors who are the Federal employees most directly involved with loanmaking. They have final responsibility for approving most loans, appraising the property to be bought under the rural rental housing programs, checking the eligibility of recipients for FmHA loans, and ensuring compliance with all Federal laws.

B. Civil Rights Assignments—FmHA

FmHA has a small administrative staff for Equal Opportunity in the Office of the Administrator in the FmHA Washington office. The Equal Opportunity Staff consists of three full-time professional employees: the director, an assistant, and a housing specialist hired on a temporary basis.[37] All of these officials have some FmHA fair housing responsibilities.

County offices are also responsible for carrying out the civil rights responsibilities of the agency, including its fair housing responsibilities, with guidance from the Equal Opportunity Staff in the Washington office.

FmHA reported that out of a total of 7,205 employees, approximately 1,200 FmHA staff members work on fair housing part time.[38] However, in fiscal year 1977, their combined fair housing efforts totaled only 8 work years, which averages less than 1 percent of each person's time. Moreover, no career employee spends more than 50 percent of his or her time on fair housing matters.[39] FmHA estimates that 15 and 16 work years will be spent on fair housing in fiscal years 1978 and 1979.[40] According to USDA staff, so little staff time is devoted to fair housing activities that there have been inadequate compliance reviews and compliance investigations.[41]

In fiscal year 1977, $176,000 was spent on fair housing compliance and monitoring efforts. The estimated figures for fiscal year 1978 and fiscal year 1979 are $342,000 and $340,000, respectively,[42] which is approximately 0.01 percent of the FmHA housing assistance budget.

FmHA wrote to this Commission:

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state, "The Multiple Family Housing Loan Division develops and recommends operating plans and procedures for rental and cooperative housing loans [and others]. It inspects and evaluates the administration of such programs as executed by FmHA State and County Offices." 7 C.F.R. § 1800.2(h)(2) (1977).

[29] According to USDA regulations, "This staff will monitor the field execution of programs to ensure that programs are being administered as designed, to identify potential and emerging problems, and to determine opportunities for more productive utilization of field personnel. To this end, Operations Review will: (a) develop an overall program for monitoring program execution; (b) coordinate all agencywide efforts involved in reviewing and auditing the field activities; (c) assist in the preparation of work measurement standards; (d) analyze the results of monitoring efforts; and (e) identify action needs to the Assistant Administrators." Farmers Home Administration, "Functional Organization of the Farmers Home Administration," Procedure Notice, Issue No. Special (Jan. 8, 1975). Assignment of functions to this staff is included in FmHA Instruction 010.1, Exhibit B, p. 8.

[30] Yates interview.

[31] Ibid.

[32] Some State offices serve more than one State. 7 C.F.R. § 1800.1 (1977).

[33] 7 C.F.R. § 1800.1 (1977). Some county offices serve more than one county. 7 C.F.R. § 1800.4 (1977).

[34] William Tippins, Director, Equal Opportunity, FmHA, interview, Dec. 9, 1977 (hereafter cited as Tippins interview, Dec. 9, 1977).

[35] FmHA county staff are responsible for ensuring that monthly payments are made, taxes and insurance premiums are paid, and any other lender functions are performed.

[36] FmHA regulations state: "The Local County Office is the normal channel through which the public is expected to seek information, make application for assistance, and conduct business with the Farmers Home Administration." 7 C.F.R. § 1800.4 (1977).

[37] Wiseman interview.

[38] William Tippins, Director, Equal Opportunity, FmHA, interview, Dec. 2, 1977 (hereafter cited as Tippins interview, Dec. 2, 1977).

[39] Farmers Home Administration, A-11 budget submission to the Office of Management and Budget (undated) (hereafter referred to as A-11 budget submission).

[40] Response from Gordon Cavanaugh, Administrator, FmHA, to U.S. Commission on Civil Rights questionnaire, Dec. 12, 1977 (hereafter cited as FmHA response).

[41] A-11 budget submission.

[42] Tippins interviews, Dec. 2 and Dec. 9, 1977, and Richard J. Peer, Chief, Compliance and Enforcement Division, Office of Equal Opportunity, Department of Agriculture, interview, Dec. 12, 1977. Compliance reviews and complaint investigations are discussed below.

[43] A-11 budget submission.

It has become painfully clear that the staffing level of the FmHA Equal Opportunity office has to be increased in order to effectively and strongly carry out its mandate of equal opportunity for all FmHA programs. The Administrator is currently meeting with his staff to determine an organizational structure and a realistic staffing pattern that fit the constraints of budget and personnel ceiling.[41]

C. Office of Equal Opportunity—Department of Agriculture

Within the Office of the Secretary of the Department of Agriculture is an Office of Equal Opportunity (OEO) which has some duty to oversee and evaluate the FmHA fair housing effort. OEO has responsibility for overseeing civil rights efforts of the entire Department and developing procedures for various agencies within the Department to monitor compliance with civil rights laws.[42] This office, which is under the supervision of the Assistant Secretary for Administration, is directed to develop and administer "a comprehensive program to assure equal opportunity for all persons in all aspects of USDA programs without regard to race, color, national origin, sex or religion. . . ."[43]

To carry out this task, the office has a staff of 48,[44] including 16 full-time professionals who have some FmHA fair housing assignments. Two of these, one of whom is temporary, are assigned full time to oversight and evaluation of FmHA activities; only one aspect of their assignments is fair housing. In addition, 2 of the 16 professionals are also assigned full time to investigate Farmers Home Administration (FmHA) complaints, a substantial number of which involve housing. USDA observed, "Thus, total staff time spent on FmHA would exceed 5 person years."[45]

OEO outlays for FmHA fair housing activities for fiscal year 1977 were only $925; for fiscal years 1978 and 1979, outlays are estimated to be only $2,500 and $3,000, respectively.[46]

[41] Cavanaugh comments.
[42] See generally Department of Agriculture, Title IX, Administrative Regulations (hereafter cited as 9 A.R.)
[43] 9 A.R. 2. Equal employment opportunity within the Department of Agriculture is assigned to the Office of Personnel.
[44] William C. Payne, Deputy Chief, Program Planning and Evaluation Division, Office of Equal Opportunity, Department of Agriculture, interview, Dec. 6, 1977.
[45] Peer comments.
[46] Richard J. Peer, Chief, Compliance and Enforcement Division, Office of Equal Opportunity, Department of Agriculture, response to U.S. Commission on Civil Rights questionnaire, Dec. 12, 1977.
[47] Tippins interview, Dec. 9, 1977.

D. Training of FmHA Staff and Outreach

Civil rights training of FmHA county personnel is extremely critical since these staff are in frequent contact with the public in the administration of FmHA programs. Contact with the public, particularly with minorities and women, is important in publicizing the availability of loans and FmHA equal opportunity practices.

In terms of outreach, the FmHA prepares brochures both in English and in Spanish, which are available to prospective borrowers.[47] OEO has prepared a list of local minority organizations[48] with whom county offices should work to ensure that minorities are familiar with USDA programs, including those operated by FmHA.

According to the FmHA Equal Opportunity Director, outreach efforts are sporadic. He observed that the county offices have such a wide variety of time-consuming tasks to perform that little time remains for outreach. "With current staff levels," he said, "an adequate outreach program would probably have to be contracted out."[49]

Civil rights awareness training has been provided to 6,300 field employees and 48 national office employees. It consist of 8 hours of group training on a variety of topics, such as "cultural differences, education variances, historical achievements [and] myths."[50] The training was not directed exclusively to fair housing.

The FmHA Equal Opportunity Director also attends State meetings of all employees in the State and is given time on the program (1/2 to 1-1/2 hours) to discuss changes in requirements and new laws affecting equal opportunity and responsibilities of Federal employees in equal opportunity matters.[51] Training in conducting compliance reviews has been given to only a fraction of all FmHA employees responsible for conducting or analyzing compliance reviews, including district directors, county supervisors, and State program chiefs or specialists.[52] This training has been given four times a year to about 25

[48] U.S., Department of Agriculture, Office of Equal Opportunity, *Grass Roots Organizations: A Directory for Reaching Minority Communities* (February 1976).
[49] Tippins interview, Dec. 9, 1977.
[50] FmHA response.
[51] Tippins interview, Dec. 2, 1977. Since 1972 about 725 employees have received training. Even if none of those trained had left the agency, they represent only a portion of staff who conduct compliance reviews. There are, for example, 1,750 county supervisors who may conduct reviews of FmHA's multifamily projects funded by FmHA loans made to individual builders or developers.
[52] Ibid.

employees each time. It lasts for about 20 hours and covers a broad range of civil rights responsibilities, including fair housing.

Thus, personnel who are responsible for the day-to-day operation of programs have very limited formal training with regard to fair housing. Furthermore, according to the FmHA Equal Opportunity Director, the quality of the training itself is questionable.[53] It also appears to be out of date: for example, the curriculum outline for compliance review training is dated May 1972, and the study guide entitled "Civil Rights Compliance Review Course" is dated November 1971. Neither of these documents contains references to the Equal Credit Opportunity Act nor to the 1974 amendments to Title VIII of the Civil Rights Act of 1968 prohibiting discrimination on the basis of sex.

III. Certifications

Prior to receiving FmHA loans, borrowers are required to sign certifications of nondiscrimination and may be required to take affirmative steps to ensure that minorities and women participate in such programs. The Farmers Home Administration uses three forms dealing with fair housing which borrowers must sign when they receive loans.

1. Form FmHA 440–45

Form FmHA 440–45[54] is to be signed by individual borrowers for the purchase, construction, or repair of a home. Part A of the form is a certification that the borrower has not been the object of discrimination. Part A states:

> (1) I certify to the best of my knowledge—
>
> (a) The decision to buy the particular house and lot to be financed with the loan was mine and no person has coerced or unduly influenced me to buy this particular property;
>
> (b) The seller has not declined to show me any other house or lot because of my race, color, religion, sex, age, marital status, or national origin; and
>
> (c) I have not been discriminated against in the selection of this house or lot because of my race, color, religion, sex, age, marital status, or national origin.[55]

Form FmHA 440–45 thus places a heavy burden on the borrower by requiring certification that no discrimination has taken place even though he or she may not have all the information necessary to make such a judgment.[56] One effect of the form could thus be the exoneration of FmHA officials or members of the real estate industry who participate in FmHA programs for discrimination they may have caused or exacerbated. The certification does not inform borrowers how to tell if discrimination has occurred, although it does tell the borrower what to do if he or she believes discrimination has occurred.[57] Part B of the form certifies that the borrower will not violate Title VIII of the Civil Rights Act of 1968 in the future resale or rental of the property.[58]

2. Form FHA 400–4

Rural rental housing loan borrowers must sign Form FHA[59]400–4 [60], an agreement promising not to discriminate on the basis of race, color, or national origin in the rental of the multifamily dwellings which they construct or rehabilitate. The form has not been revised since 1964 and thus does not reflect the amendment to Title VIII prohibiting discrimination based on sex. The borrower is required to keep records, submit reports upon request, and allow access to the property by FmHA employees to inspect any records.[61] A violation of the agreement may result in such sanctions as the termination of financial assistance, acceleration of the loan repayment, or appointment of a receiver or third party to manage the property.

3. Affirmative Fair Housing Marketing Agreement

To implement Title VIII of the Civil Rights Act of 1968, in September 1977 the Farmers Home Administration issued regulations requiring affirmative fair housing marketing plans of subdivision

[53] Tippins interview, Dec. 9, 1977.

[54] U.S., Department of Agriculture, Farmers Home Administration, "Nondiscrimination Certificate (Individual Housing)" (Rev. June 8, 1977) (hereafter cited as Form FmHA 440–45).

[55] Ibid.

[56] A recent nationwide study by the National Committee Against Discrimination in Housing (NCDH) emphasizes this point. One of the major findings of that study was that "Quite often the black homeseeker is unaware that discrimination has occurred." National Committee Against Discrimination in Housing, *Trends*, vol. 21, no. 3 (Fall 1977).

[57] Part A(3) of the form states: "I understand that if I know or should learn that I have actually been discriminated against in connection with this transaction, I should inform the County Supervisor of the Farmers Home Administration whose address is. . .or the State Director of the Farmers Home Administration whose address is. . ." Form FmHA 440–45.

[58] Ibid.

[59] In its earlier years FmHA had the acronym "FHA." However, more recently it has adopted the acronym "FmHA" to distinguish it from the Federal Housing Administration.

[60] U.S., Department of Agriculture, Farmers Home Administration, "Nondiscrimination Agreement (Under Title VI, Civil Rights Act of 1964)" (Dec. 29, 1964).

[61] Ibid. As discussed in this chapter in the section on data collection, USDA does not require rural rental housing loan borrowers to collect data on the race, national origin, or sex of renters.

developers of five or more units, builders of multiple-family projects with five or more units, and real estate brokers listing five or more FmHA-acquired properties.[62] Essentially the same as those issued by the Department of Housing and Urban Development,[63] the regulations require these participants in FmHA programs to be signatories to voluntary affirmative marketing plans approved by HUD or to file HUD Form 935.2.[64]

Specifically, the regulations require covered participants to:

- Reach those prospective buyers or tenants, regardless of sex, of majority and minority groups in the marketing area who traditionally would not be expected to apply for such housing without special outreach because of existing racial or socioeconomic patterns.[65]
- Undertake and/or maintain a nondiscriminatory hiring policy in recruiting from both majority and minority groups, including both sexes, for staff engaged in the sale or rental of properties.[66]
- Train and instruct employees engaged in the sale or rental of properties in the policy and application of nondiscrimination and fair housing.[67]
- Display in all sales and rental offices the "Fair Housing" poster.[68]
- Post in a conspicuous position on each property and FmHA construction site a sign displaying the equal opportunity logo[69] or the following statement: "We are pledged to the letter and spirit of U.S. policy for the achievement of equal housing opportunity throughout the nation. We encourage and support an affirmative advertising and marketing program in which there are no barriers to obtaining housing because of race, color, religion, sex, or national origin."[70]
- Undertake efforts to publicize the availability of housing opportunities to minority persons through the type of media customarily used by the applicant or participant, including minority publications and other minority outlets available in the housing market area. As part of these efforts, all advertising must include either the equal housing opportunity logo or statement. When illustrations or persons are included, they shall depict persons of both sexes and of majority and minority groups.[71]

The plans are limited in scope. They apply only to housing which is ultimately purchased with loans made by FmHA and do not apply to homes not financed by FmHA even if those homes are built or sold by persons who have signed affirmative marketing plans. The regulations are thus weaker than the joint broker certification requirements of the Veterans Administration and the Department of Housing and Urban Development.[72] Moreover, they fail to take into account the fact that builders and sellers also benefit by virtue of the fact that a property has been approved by FmHA.[73]

Farmers Home Administration staff place a great deal of confidence in the affirmative fair housing marketing plan as a tool for ensuring compliance with fair housing laws.[74] The agency also reports that the affirmative marketing plan "is an important tool to insure equal opportunity in the housing programs administered by this Agency."[75]

As of December 1977, however, compliance with these plans was not being monitored by FmHA. There was also confusion regarding responsibility for monitoring affirmative action plans. Some program staff believe that responsibility lies solely with FmHA's Equal Opportunity Staff.[76] A careful examination of the affirmative marketing agreement and of relevant operating instructions[77] makes clear that neither the program staff nor the Equal Opportunity Staff have specific responsibilities to perform. As a result of this failure to delineate responsibilities, FmHA officials were unable to state

[62] 42 Fed. Reg. 4,583 (1977) (as codified in 7 C.F.R. § 1901.203(c)). Proposed rules were published for review and comment on Mar. 9, 1977, 42 Fed. Reg. 13,116 (1977).
[63] 24 C.F.R. § 200.600 (1977).
[64] 42 Fed. Reg. 45,894 (1977) (to be codified in 7 C.F.R. § 1901.203(c)(3) (1977)).
[65] *Id.* at 45,894 (1977) (to be codified in 7 C.F.R. § 1901.203(c)(3)(i) (1977)).
[66] *Id.* at 45,894 (1977) (to be codified in 7 C.F.R. § 1901.203(c)(3)(ii) (1977)).
[67] *Id.* at 45,894 (1977) (to be codified in 7 C.F.R. § 1901.203(c)(3)(iii) (1977)).
[68] *Id.* at 45,894 (1977) (to be codified in 7 C.F.R. § 1901.23(c)(3)(iv)).
[69] The logo is a frequently used trademark symbolizing that the user adhered to nondiscriminatory housing practices. It is used, for example, in a fair housing poster shown in the chapter of this report on the Veterans Administration.
[70] 42 Fed. Reg. 45,894 (1977) (to be codified in 7 C.F.R. § 1901.203(c)(3)(v)).
[71] *Id.* at 45,894 (1977) (to be codified in 7 C.F.R. § 1901.203(c)(vi)).
[72] See, for example, the discussion concerning VA Form 26-318 in the chapter in this report on the Veterans Administration.
[73] For example, builders and developers receive benefits for all of the houses in a subdivision receiving FmHA subdivision approval, not merely those sold with FmHA loans. It is often the FmHA approval which enables the builders to obtain a loan from a bank. Similarly, real estate brokers benefit from the sale of all FmHA-acquired property, not merely that sold with FmHA loans.
[74] Yates interview; Paul R. Conn, Director, Multiple Family Housing, Farmers Home Administration, interview, Dec. 8, 1977 (hereafter cited as Conn interview); Wiseman interview.
[75] FmHA response.
[76] Conn interview.
[77] 7 C.F.R. § 1901.203(c) (1977).

how affirmative fair marketing housing agreements would be monitored.[78]

FmHA wrote to this Commission:

> FmHA regulations concerning this section will be reviewed with the Office of General Counsel with the intention of expanding them to reflect the joint broker certification requirements of the Veterans Administration and the Department of Housing and Urban Development.
>
> Compliance with these plans will be highlighted in the Compliance Review Training Program conducted by the FmHA Equal Opportunity Staff. The monitoring of these affirmative fair housing plans will be achieved by on-site compliance reviews conducted by the FmHA County Offices, by selected compliance reviews performed throughout the program year by the FmHA Equal Opportunity Staff, and through renewed efforts with the Operations Review Teams.[79]

IV. Fair Housing Enforcement Mechanisms

A. Data Collection and Use

1. Data Collection

The Department of Agriculture's administrative regulations require the collection of data that can be used to monitor compliance with fair housing requirements in FmHA programs. These regulations hold the Farmers Home Administration, in conjunction with the Department's Office of Equal Opportunity, responsible for "collecting and evaluating program participation data and for setting targets for the delivery of program benefits to minorities."[80]

Steps to be taken by FmHA include:

1. Measuring the number of minorities eligible to participate in each program;[81]
2. establishing and maintaining a "system for collecting and reporting data on minority participation";[82]
3. reviewing programs to assess minority group participation and compliance with equal opportunity objectives;[83]
4. submitting an annual report to the Department's Office of Equal Opportunity comparing participation in programs with eligibility.[84]

One of the most serious inadequacies of these regulations is that they do not require the collection of data on sex for FmHA housing programs, although sex discrimination is prohibited in those programs by ECOA and Title VIII. As a result, information was not collected by sex for any type of borrowers in the single-family programs or for tenants in the multiple-family programs as of December 1977.[85] Failure to collect data on FmHA mortgage loans appears to be in violation of the Federal Reserve Board's Regulation B implementing ECOA.[86] Regulation B (which became effective in 1976) requires all creditors, including FmHA, to keep certain information concerning applicants for mortgage loans; the applicant's race or national origin, sex, marital status, and age.[87]

Despite the fact that USDA instructions for data collection were originally issued in July 1970,[88] as of December 1977 FmHA data collection and reporting were not adequate. Racial and ethnic data were kept on borrowers in the single-family (rural housing) loan programs,[89] but no information was obtained on the race or national origin of tenants in rural rental (multiple-family) housing.

There have been some efforts towards remedying these deficiencies, but as of early 1978 these efforts had not resulted in any new data collections. On November 2, 1976, the Office of Equal Opportunity requested FmHA to collect information by sex for rural housing borrowers and by race and ethnicity for occupants of rural rental housing facilities.[90] It did not, however, ask for collection of data on the sex of renters in the rural rental housing program.

On November 15, 1976, the FmHA Administrator responded that the agency planned to revise its forms for the rural housing loan program in order to ask loan applicants to identify their sex.[91] The Administrator also responded that collection of racial and ethnic data on tenants in rural rental facilities presented a more difficult problem because

[78] Yates, Conn, and Wiseman interviews.
[79] Cavanaugh comments.
[80] 9 A.R. 21.
[81] 9 A.R. 21.A.1.a.
[82] 9 A.R. 21.A.1.b.
[83] 9 A.R. 21.A.1.c.
[84] 9 A.R. 21.A.1.d.
[85] Tippins interview, Dec. 2, 1977.
[86] 12 C.F.R. § 202.13(a) (1977).
[87] Regulation B is discussed in detail in the chapter of this report on Federal financial regulatory agencies.
[88] Issued as Supplement 1 of Secretary of Agriculture's Memorandum No. 1662, July 27, 1970.
[89] The race or ethnicity of applicants for single-family housing is obtained on the basis of visual observation by county FmHA staff. Applicant data are maintained at the county level. If the applicant receives a loan, information is maintained in a central computer system. James Bryan, Chief, Reports Management Division, FmHA, telephone interview, Feb. 14, 1978.
[90] James Frazier, Director, OEO, Department of Agriculture, memorandum to Frank B. Elliott, Administrator, FmHA, Nov. 2, 1976.
[91] Frank B. Elliott, memorandum to James Frazier, Nov. 15, 1976.

it would be necessary to develop a new form which would have to be approved by the Office of Management and Budget (OMB).[93] Rather than requesting OMB approval, the Administrator anticipated that, "To obtain this clearance may present a problem as OMB is currently on a very positive drive to reduce the number of Public Use Forms and also the number of hours required to complete the forms and reports."[93] The Administrator did not, however, seem to be taking into account that collection of data on race and ethnic origin is essential for evaluating whether the rural rental housing program is reaching the intended beneficiaries and that OMB procedures permit the collection of data for evaluating the extent to which program goals are being achieved.[94]

More than a year after the Administrator's response to OEO, no data on sex of borrowers in the rural housing program or on the race, national origin, or sex of tenants in the rural rental housing program were being collected. According to FmHA staff, a proposal to have applicants for single-family home loans (rural housing) indicate their race, sex, age, and veteran status had been sent to the Federal Trade Commission[95] for a determination that it complies with Regulation B.[96]

FmHA proposes to collect data on the race, national origin, and sex of tenants in multiple-family housing either by adopting a form already used by the Department of Housing and Urban Development or by converting an existing FmHA tenant certification form. In either case, FmHA would require the owners of multiunit properties to designate tenants by race or ethnic groups on the basis of visual inspection. However, these data would not be collected for 12 to 18 months—after FmHA implements a new computer system. According to FmHA staff, current computer capacity cannot handle the new data FmHA proposes to collect.

Beyond these deficiencies, it should also be noted that FmHA's data system is not nearly as comprehensive as that of similar programs operated by the Veterans Administration. FmHA does not tabulate data by race and national origin on the terms under which FmHA loans are offered such as time for repayment and interest rate or the racial and ethnic composition of the neighborhoods in which borrowers purchase homes.[97]

In August 1978 FmHA observed:

> FmHA acknowledges shortcomings accompanied by difficulties in the area of data collection. The rapidly changing data requirements have outpaced the agency's current computer capability to maintain the expanded data base needed. The computer "overload" level was reached approximately 36 months ago, and efforts to update the computer capability have been underway since the overload was detected. The Unified Management Information System (UMIS) scheduled for completion before the end of calendar year 1978 will provide the capability for the additional computer elements needed. A time lag of one year following completion of UMIS has been projected before all the kinds of data required will be computer based. Because the data needs and the recommended methods of collecting such data sometimes conflict or present unique problems, FmHA is currently making plans for a meeting involving representatives of the Commission, the Federal Reserve Board, the Office of Management and Budget, the Department of Justice, the Congressional Civil Rights Oversight Subcommittee and the Department's Office of Equal Opportunity in an effort to reach a feasible working solution to the ever-expanding needs for data.[98]

2. *Minority Participation Rates*

In 1965 blacks received 9.3 percent of rural housing loans;[99] in 1972 blacks received 19.6 percent of all such loans (22,357). As shown in exhibit 5.1, since 1972 the proportion and number of loans to blacks has steadily decreased, with only 10,823 loans

[93] U.S., Office of Management and Budget, Circular A-40, "Guidelines for Reducing Public Reporting to Federal Agencies" (revised May 3, 1973); Attachment A (revised Feb. 10, 1976). One purpose of OMB Circular A-40 is to reduce the number of reports being collected from recipients of Federal money.

[94] OMB Circular A-40 states:

> Reporting and data collection required for program evaluation must directly contribute to the assessment of the degree to which program goals have been achieved or to the assessment of the effects of programs or their processes or management. (Part II B.)

[95] The Federal Trade Commission administers compliance with ECOA by FmHA as a creditor.

[96] James Bryan, Chief, Reports Management Division, FmHA, telephone interview, Feb. 14, 1978.

[97] James Bryan, Chief, Reports Management Division, FmHA, interview, Dec. 7, 1977.

[98] James Bryan, Chief, Reports Management Division, FmHA, telephone interview, Mar. 13, 1978.

[99] Cavanaugh comments.

[99] In 1965 the FmHA loan program was comparatively small. Blacks received 1,430 loans and whites received 15,365. William C. Payne, Deputy Chief, Program Planning and Evaluation Division, Office of Equal Opportunity, Department of Agriculture, interview, Feb. 28, 1978.

(9.5 percent of all rural housing loans) made to blacks in 1976.[100] The situation for Hispanics has been somewhat similar: in 1972 FmHA made 4,150 loans (3.6 percent) to Hispanics. The number fell to 2,665 (2.7 percent) in 1974. Since then, loans to Hispanics have increased slightly, but have still not reached their 1973 level.[101] The experience of white borrowers has been markedly different: since 1972 the percentage of rural housing loans going to whites has steadily risen.[102] In 1976 a greater number of loans were made to whites than ever before.

The number of applications and the rate of rejection has increased for all groups in the past 4 years (see exhibits 5.2 and 5.3). But the increased rejection rate for blacks has been the most dramatic.

One problem which may have contributed to the decline in loans to minorities is that FmHA does not have standardized criteria for approving loans. As a recent GAO report observed:

> FmHA lacks specific criteria for approving loans; consequently, decisions made by local FmHA county supervisors are somewhat subjective and result in applicants not being treated fairly and consistently. This lack of criteria offers the potential for discrimination, which if it occurs, would violate provisions of Title VIII.[103]

FmHA wrote to this Commission:

> FmHA reports that even while the Commission was collecting data for their report, agency efforts were underway to establish, to the degree possible, a uniform criteria for loan making processes. Those efforts have been supplemented by prohibitions such as those contained in the Equal Credit Opportunity Act that adverse credit reports over three years old will not be considered when processing applications for a loan. However, FmHA feels very strongly that attempts to establish rigid loan making criteria would result in the denial of loans to many applicants who might otherwise qualify, and for this reason some judgmental responsibility will be left for the loan making official.[104]

As of early 1978 FmHA lacked the data to evaluate whether its lack of credit standards was contributing to the decrease in loans to minorities. USDA officials do not know the reason for the decline in loans to minorities.[105] Although this decline began in 1972, it was not until 1977 that FmHA initiated a study to determine the reasons for the decline. In May 1977, as a preliminary to an onsite survey, FmHA sent a memorandum to selected counties seeking answers to the following questions:

- Why, in your estimation, has there been a decrease in the number of blacks applying for Section 502 loans that receive income within the required eligibility ranges?
- Why is there a marked increase in the percentage of black applicant rejects in the last 2 years?
- What changes are needed in order that the agency can reach more eligible blacks and other minorities?[106]

The results of this questionnaire were not put into any usable format. FmHA Equal Opportunity Staff felt that the results were not helpful in determining why there had been a decline in loans to minorities, and thus they did not thoroughly analyze the information collected.[107]

The subsequent onsite survey was to be conducted by the Equal Opportunity Staff of FmHA in cooperation with the Department's OEO. Some assistance was also to be provided by FmHA program staff in Washington and the State offices.[108] But the onsite survey was interrupted before it was completed. The reason FmHA gave for interrupting the study was that it was faced with other pressing matters. In FmHA's words:

> current staffing shortages have made it necessary for us to redirect our priorities at the present time. However, we are not abandoning the survey and propose to continue it as soon as our personnel resources will permit.[109]

In January 1978, as a result of pressure from a variety of sources, including the General Account-

[100] William C. Payne, "Implementing Federal Nondiscrimination Policies in the Department of Agriculture, 1964–1976," p. 10 and table 1.

[101] U.S., Department of Agriculture, Farmers Home Administration, Finance Office, "Distribution of Loans Made by Six Specified Types by Race or Ethnic Group," Fiscal Years 1972, 1973, 1974, 1975, and 1976.

[102] Payne, "Implementing Federal Nondiscrimination Policies," figure 1, p. 11.

[103] Comptroller General of the United States, *Stronger Federal Enforcements Needed to Uphold Fair Housing Laws* (Feb. 2, 1978), p. 30 (hereafter cited as *Stronger Enforcements Needed*). GAO staff reviewed more than 200 rejected and approved loan files in 15 county offices.

[104] Cavanaugh comments.

[105] Tippins interview, Dec. 2, 1977; L.D. Elwell, Assistant Administrator for Rural Housing, FmHA, interview, Dec. 12, 1977; Wiseman interview.

[106] Denton E. Sprague, Acting Administrator, Farmers Home Administration, memorandum to State Directors, District Directors, and Selected County Supervisors, FmHA, May 3, 1977.

[107] Tippins interview, Dec. 9, 1977.

[108] Ibid.

[109] William A. Tippins, Equal Opportunity Officer, Farmers Home Administration, memorandum to James Frazier, Director, Office of Equal Opportunity, Department of Agriculture, Nov. 29, 1977.

EXHIBIT 5.1

Number and Percentage Distribution of FmHA Rural Housing Loans, by Race and Ethnic Group

Fiscal Year	White		Black		Hispanic		Native American		Other	
	No.	%	No.	%	No.	%	No.	%	No.	%
1972	87,216	76.3	22,357	19.6	4,150	3.6	417	0.4	141	0.1
1973	91,369	78.2	20,963	17.9	3,987	3.4	485	0.4	142	0.1
1974	78,614	82.7	13,089	13.8	2,665	2.7	441	0.5	239	0.3
1975	87,869	85.3	11,670	11.3	2,801	2.7	427	0.4	238	0.3
1976	99,142	87.1	10,823	9.5	3,197	2.8	486	0.4	257	0.2
1977	102,568	87.7	10,893	9.3	2,838	2.4	459	0.4	278	0.2

Source: U.S., Department of Agriculture, Farmers Home Administration, Finance Office, "Distributions of Loans made by Six Specific Types by Race or Ethnic Group," fiscal years 1972–77.

EXHIBIT 5.2

Percentage of Applications for Rural Housing Loans Which Were Rejected, by Race and Ethnic Group

Fiscal Year	White	Black	Hispanic	Native American	Other
1974	54.6	56.0	53.9	63.0	7.0
1975	61.4	62.7	56.2	73.2	41.1
1976	57.8	67.6	57.0	78.8	48.0
1977	59.7	71.3	60.2	64.6	56.0

Source: U.S., Department of Agriculture, Farmers Home Administration, Finance Office, "Distributions of Loans made by Six Specific Types by Race or Ethnic Group," fiscal years 1972–77.

EXHIBIT 5.3

Number of Applications for Rural Housing Loans, by Race and Ethnic Group

Fiscal Year	White	Black	Hispanic	Native American	Other
1974	173,031	29,724	5,779	1,200	257
1975	227,642	31,269	6,390	1,594	404
1976	234,926	33,359	7,436	2,294	494
1977	254,684	38,005	7,130	1,298	632

Source: U.S., Department of Agriculture, Farmers Home Administration, "Applications for Initial Loans Received From Individuals By Type of Loan and by Race or Ethnic Group," fiscal years 1972-77.

ing Office, the Department of Justice, and the U.S. Commission on Civil Rights, the survey was resumed and is in effect.[110] As of June 1977, FmHA had no written report of the survey results, although the field work had been completed.

3. Targeting and Lending

To improve minority participation in USDA programs, USDA administrative regulations require that its agencies, including FmHA, set targets for minority participation in all programs.[111] There is no comparable requirement for setting targets for female participation. Under the targeting procedure,

[110] Tippins interview, Mar. 6, 1978.

[111] Regulations for targeting were issued on May 18, 1972. They state: The systematic inclusion of minority considerations in formal planning efforts serves two purposes: (1) to promote parity of participation by minorities and women in the benefits of USDA programs and (2) to provide approved targets against which performance can be measured. 9 A.R. 21.B.
This instruction was first issued as Memorandum 1662, Supplement 5, May 18, 1972 (hereafter cited as Memorandum 1662, Supplement 5).

FmHA is supposed to identify "parity" of participation for minorities by developing specific targets for their participation in each of its programs annually. USDA administrative regulations provide little guidance for computing parity or evaluating compliance with the targets.

For several reasons, the targeting procedure has not been an effective tool for enforcing fair housing. First, State directors generally develop targets without participation from the FmHA Equal Opportunity Staff in Washington.[113] Targets have sometimes been set below performance levels and targets for the preceding year.[115] Second, targets are neither developed nor measured for the number of eligible participants, as required by the administrative regulations.[114] Therefore, it is impossible to determine whether the targets have any relationship to needs. Third, targets are established and performance is reported only by State, so that county needs are not considered individually. Equal Opportunity Staff note that State totals might look reasonable, but individual counties may fall far short of expected performance levels.[115] Fourth, although USDA regulations do not exempt multiple-family housing loans from the target procedures, FmHA does not set targets for beneficiaries of those programs because they lack the data to do so.

There are no adequate procedures for ensuring that targets are meaningful and that compliance with those targets is achieved. The FmHA Equal Opportunity Staff receives the State targets and sends them, without evaluation, to the departmental OEO.[116] OEO then evaluates the targets and reports its findings to FmHA. However, FmHA approves targets even when OEO has found them inadequate.[117] Further, no corrective action is taken when State offices fail to meet their targets.[118]

Recently, FmHA has taken some preliminary steps to evaluate targeting procedures. On December 6, 1977, FmHA sent a memorandum to State directors asking them to explain how the targets for fiscal year 1977 and 1978 were determined, the reasons targets were not reached or exceeded, why future targets ought to be higher or lower, and descriptions of the problems in particular counties.[119]

The FmHA Equal Opportunity Director opposes the concept of targeting. The procedures, he noted, began in 1973 and coincided with the decline in housing loans to blacks and other minorities. Furthermore, he said, if monitoring of the FmHA program were really effective, targets would be unnecessary. County supervisors, he said, simply do not have the time to engage in such monitoring.[120]

The view of the Equal Opportunity Director ignores the fact that, if USDA's targeting system were operating effectively, it would constitute a means for monitoring USDA programs to determine if they were serving minorities fairly. At a minimum, an adequate monitoring system must include a means for determining and evaluating minority and female participation in FmHA programs. A targeting system such as the one USDA has drafted would have to be a key element in any effective monitoring system.

B. Compliance Reviews

1. FmHA Reviews

FmHA compliance reviews include examination of records,[121] including operating regulations;[122] a review of the effectiveness of advertising,[123] particularly for minorities; and interviews with organization officials and community leaders, including minority leaders, to determine whether the operation of the facility is nondiscriminatory.[124] However, FmHA regulations do not describe what information is to be obtained, how to evaluate and interpret the information, or what constitutes noncompliance. Review reports are sent to the State director, along with a finding of discrimination where applicable.[125] State directors are supposed to ensure that the reports are complete, and to send them immediately to the FmHA Equal Opportunity Director in Washington when discrimination is found.[126]

[113] Tippins interview, Dec. 9, 1977.
[114] U.S., Department of Agriculture, Office of Equal Opportunity, "Participation by Ethnic Groups in the Farmers Home Administration Rural Housing Loan Program, Fiscal Year 1976" (March 1977).
[115] Tippins interview, Dec. 9, 1977.
[116] Ibid.
[117] Ibid.
[118] Percy Luney, Chief, Program Planning and Evaluation Division, Office of Equal Opportunity, Department of Agriculture, interview, Dec. 6, 1977.
[119] "Participation by Ethnic Groups in the Farmers Home Administration Rural Housing Loan Program, Fiscal Year 1976" (April 1977); "Fiscal Year 1975" (June 1976).
[120] Tippins interview, Dec. 9, 1977.
[121] Ibid.
[122] 7 C.F.R. § 1901.204(c)(2)(iii) and (d)(2)(i) (1977).
[123] 7 C.F.R. § 1901.204(c)(2)(i) (1977).
[124] 7 C.F.R. § 1901.204(c)(2)(ii) and (d)(2)(ii) (1977).
[125] 7 C.F.R. § 1901.204(d)(2)(iv) (1977).
[126] 7 C.F.R. § 1901.204(d)(3)(ii) (1977). Reviews are recorded on FmHA Form 400–8.
[126] 7 C.F.R. § 1901.204(d)(5) (1977).

Initial compliance reviews of rural rental housing are supposed to occur within 1 year after the loan is made or after Form FmHA 400–4 is signed.[127] Subsequent reviews are to take place at intervals of from 90 days to 3 years.[128]

Compliance reviews have often been conducted by field staff who have close ties to the communities in which they operate.[129] In conducting compliance reviews of multiple-family housing loans to individuals, the county supervisor is not required to visit the facility, but conducts the review based on knowledge of the borrower's facilities from other visits. Reviewers often fail to look at records and interview officials or community leaders.[130] Indeed, OEO has found that the quality and frequency of compliance and followup depend a great deal upon the expertise and interest of the county supervisors.[131]

The FmHA Equal Opportunity Director estimates that it would take about 8 hours, including travel time, to conduct an effective compliance review.[132] In contrast, a senior OEO official estimates that an effective compliance review for Farmers Home Administration programs would take approximately 20 hours of staff time, including travel time.[133] However, often the reviews are carried out more quickly than either official believes to be adequate. One district director on 4 different days conducted nine, six, five, and three reviews, respectively. Two or three reviews per day are apparently quite common.[134]

A report on FmHA compliance reviews done by the departmental OEO showed that the State director often fails to review the reports as required but assigns this task to State staff who, in the absence of clear instruction, do not know what the reviews should contain. As the OEO report stated:

> In all States monitored, FmHA personnel other than the State Director were reviewing compliance review reports. FmHA State personnel were not sure what they were looking for in their review of the compliance reports other than the form being signed by the appropriate reviewing official and whether the recipient was shown to be in compliance.[135]

The OEO review indicates that its "general impression. . .was that FmHA officials considered these reviews a waste of time. . . ."[136] As evidence, the report indicates that, of 3,028 reviews conducted by FmHA in fiscal year 1975, no instances of noncompliance were reported.

The failure to find fair housing violations has continued. In fiscal year 1976, 522 reviews were conducted and only 1 rural rental housing borrower was reported in noncompliance.[137] In fiscal year 1977, 932 reviews were conducted, revealing only 1 possible fair housing violation.[138] From October 1, 1977 (the outset of fiscal year 1978) through mid-December 1977, 761 reviews were conducted, and no fair housing violations were found.[139]

There is evidence from a variety of sources that most FmHA-financed projects—homeownership and rental—are segregated by race.[140] In a study of 137 rural rental housing projects, the General Accounting Office found that 89 of 116 projects for which data were available served one race only.[141] The report states:

> . . .FmHA. . .does not view such projects to be in violation of Title VI, and does not require any affirmative action to desegregate projects.[142]

It appears that there is a tendency among FmHA officials to accept such findings without determining whether action could be taken to remedy the

[127] 7 C.F.R. § 1901.204(e)(2)(v) (1977).
[128] 7 C.F.R. § 1901.204(e)(3) (1977).
[129] Gordon Cavanaugh, Administrator, Farmers Home Administration, interview, Dec. 14, 1977.
[130] U.S., Department of Agriculture, Office of Equal Opportunity, Compliance and Enforcement Division, "Compliance Review Evaluation Report: Farmers Home Administration" (Fiscal Year 1977) (hereafter cited as "Compliance Review Evaluation Report").
[131] Ibid.
[132] Tippins interview, Dec. 2, 1977.
[133] Richard Peez, Chief, Compliance and Enforcement Division, Office of Equal Opportunity, Department of Agriculture, interview, Dec. 6, 1977 (hereafter cited as Peer interview).
[134] "Compliance Review Evaluation Report," p. 26.
[135] Ibid., p. 9.
[136] Ibid., p. 29.
[137] FmHA response.
[138] "Compliance Review Evaluation Report," p. 29. FmHA reported that the borrower promised to undertake affirmative marketing procedures, which are being monitored by FmHA, after it was discovered that the borrower had denied an apartment to a black applicant who planned to share the apartment with a white friend.
[139] FmHA response. This possible violation was observed at a nursing home funded by FmHA. As of mid-December 1977, the problem had not yet been resolved.
[140] Peer interview; Conn interview; Wiseman interview; Escambia County Compliance Review; Compliance Enforcement Division, Office of Equal Opportunity, Department of Agriculture, "Civil Rights Compliance Review of Ashley County, Arkansas" (June 12, 1975); "Civil Rights Compliance Review: Clarke County, Alabama" (Sept. 12, 1975), p. 11. See also Urban Systems Research and Engineering, Inc., *Discrimination in Rural Housing: Case Studies and Analysis of Six Selected Markets* (Cambridge, Mass.), vol. I, *Analysis and Findings*, pp. 15, 25–31.
[141] *Stronger Enforcements Needed*, p. 13.
[142] Ibid.

situation. For example, one FmHA official indicated that rural rental housing is generally built in the "best" area of the town (usually the white area), and that blacks might feel uncomfortable applying for a rental unit in that area. He further stated that once a project took on a racial or ethnic "makeup" people from other other racial or ethnic groups tended to shy away.[143] Another official indicated that it would not be appropriate for FmHA to try to decrease racial segregation in rural rental housing in that such an action would be "forcing the people to live in certain areas."[144] The GAO report states that "FmHA does not believe that a historical pattern of racial separation necessarily constitutes discrimination per se."[145]

Another example of USDA's implicit approval of segregated housing comes from its guidance to auditors. Exhibit B of the Audit Guide, entitled "Quality of Housing in FHA-Financed Minority Subdivisions,"[146] calls for comparisons between the quality of housing built for minorities and similarly priced housing for whites. The reason is that:

> [FmHA] is concerned about reports it is receiving of inadequate waste disposal and water facilities, poor construction and improper site selection or developments in subdivisions financed by FHA and occupied primarily by minority families.[147]

This instruction encourages auditors to accept the existence of segregated subdivisions. It does not state that an FmHA-financed subdivision occupied primarily by families of one race could itself be an indication of a serious violation of both Title VI of the Civil Rights Act of 1964 and FmHA's own regulations regarding site selection, which state:

> to the extent possible, the location of an RRH [rural rental housing] project should provide housing opportunities for minority families outside areas of minority concentration and areas which are already substantially mixed. . . .The location of housing should also promote an equal opportunity for inclusion of all groups regardless of race, color, creed, sex, national origin, or marital status, thereby opening up nonsegregated housing opportunities for minorities and helping to overcome the effects of any past discrimination.[148]

The Office of Equal Opportunity commented:

> In our view, FmHA Regulation 7 CFR 1822.88(q) Location of Housing cited in the report on page 5-28 can operate to the detriment of minorities as well as to their advantage. The intent of the regulation is to promote equal opportunity in housing by prohibiting the FmHA financing of rental housing projects in areas of minority concentration. In effect, the regulation also could be used to redline the minority community and prevent FmHA from increasing rental housing in such areas.
>
> Since all FmHA financed housing projects regardless of site selection open up integrated housing opportunities, the rental of the units is critical with integration working both ways. Whites should have the same opportunity to move into minority communities as minorities to move into white communities. The FmHA regulation does not prohibit, indeed it encourages, the location of rural rental housing projects in predominantly white communities, thus upgrading the available housing and providing financing in these communities with very little follow-up to assure and promote integrated housing.[149]

OEO has expressed concern that the FmHA regulation will result in improvements to predominantly white communities rather than in any benefit to minorities. The regulation, however, has considerable merit. Absence of low-income housing from the more affluent sections of a community has been a major obstacle to fair housing for minorities and female-headed households.[150] If properly applied, the FmHA regulation could help alleviate this problem. The regulation is similar to the Department of Housing and Urban Development's requirement that public housing authorities participating in

[143] Conn interview.
[144] Wiseman interview.
[145] *Stronger Enforcements Needed*, p. 11.
[146] U.S., Department of Agriculture, Office of the Inspector General, Inspector General Bulletin No. 107, April 1972 (hereafter cited as Bulletin No. 107).
[147] Ibid., p. 2.
[148] 7 C.F.R. § 1822.88(q) (1977). There are only two exceptions to this rule. Housing may be built in areas of minority concentration when:
(1) Comparable housing opportunities exist outside the minority area for minority families in the income range to be served by the project; or
(2) The applicant provides written documentation which adequately demonstrates that there are no other acceptable sites available outside the area of minority concentration and housing on the proposed site is necessary to meet an overriding housing need in the market area.
[149] Peer comments.
[150] The Potomac Institute, *Equal Housing Opportunity: The Unfinished Agenda* (December 1976), p. 52. This problem is also discussed in the chapter in this report on the Department of Housing and Urban Development.

HUD's rent subsidy program must ensure that housing of eligible families can be found " in areas outside low-income and minority concentrations. . .where possible."[151] It would then appear that what is required is USDA monitoring of compliance with the regulation, to ensure that it is not misinterpreted or misused.

2. OEO Reviews

In addition to compliance reviews by FmHA field staff, the departmental OEO may conduct multiagency compliance reviews,[152] of which the Farmers Home Administration is only one part.[153] However, no multiagency compliance reviews were made by OEO in fiscal year 1977 and only 2 were conducted in 1976,[154] both in Alabama.

In both of the 1976 reviews, the data gathered indicated the possibility of substantial civil rights violations. However, the investigations were inadequate, and the reviewers ignored these possible violations in reporting their findings and recommendations.

In one of the 1976 reviews, the reviewer's principal findings concerning FmHA were that it "did not always include the nondiscrimination statement in articles concerning program availability," and that "FmHA employees had not received adequate civil rights training." But data contained in the review revealed segregated housing. In that review, there were three FmHA-funded rural rental housing projects, a duplex serving two white families and two apartment complexes serving only blacks.[155] The reviewer did not appear to have investigated whether FmHA regulations on selection criteria[156] had been violated.

The Office of Equal Opportunity wrote to this Commission:

> [S]everal white families in the past had resided in rental units in the projects which had only black occupants at the time of the review. Also the two projects were built by private individuals who selected the sites and leased them to the housing authority. Regardless of whether or not the rental projects were located in areas of minority concentration, the two apartment complexes did, in fact, open up integrated housing opportunities.[157]

Since the rental projects were occupied only by persons of one race at the time of the review, there appears to be no basis for OEO's assertion that the apartment complexes "did open up integrated housing opportunities." Moreover, OEO neglected to mention that the projects built by private individuals were financed by FmHA loans. Thus, an investigation of compliance with FmHA's site selection criteria should have been conducted.

The investigative report showed no assessment of the location of the housing to determine if it was located outside an area of minority concentration and in one which would open up integrated housing opportunities. The investigation also did not report whether there were nonblacks who were eligible to live in the FmHA-funded housing and, if so, what factors operated to keep them from living in the housing. The report contained no recommendations pertaining to the finding of segregated housing, but rather its only recommendation was that the housing authority should be advised "to advertise future vacancies in local papers and use a statement of nondiscrimination"[158] and that the county supervisor be given compliance review training.[159]

The Office of Equal Opportunity wrote to this Commission:

> The analysis is critical of the review report for failure to include recommendations related to the finding of segregated housing, but the Commission fails to state what additional recommendations should be made to promote the movement of white families into the projects. In the view of the reviewers, the proper corrective action for the situation as found was a strong outreach program to attract renters regardless of race, and training of personnel to see that this was done.[160]

[151] 24 C.F.R. § 882.204(b) (1977).

[152] The administrative regulations of the Department of Agriculture give the Compliance and Enforcement Division of the Department's Office of Equal Opportunity the following authority:

> Coordinates civil rights compliance activities for USDA programs. Evaluates agency compliance operations to determine if the applicable laws, policies, rules and regulations of the Federal Government and the Department are being fully implemented. Conducts civil rights compliance reviews. Assists agencies to develop and implement compliance procedures. Process complaints alleging program discrimination. 9 A.R. 1, p. 4.

[153] Peer interview.

[154] Richard J. Peer, Chief, Compliance and Enforcement Division, Office of Equal Opportunity, Department of Agriculture, response to U.S. Commission on Civil Rights questionnaire, Dec. 12, 1977.

[155] Civil Rights Compliance Reviews of Escambia County, Alabama, May 12, 1976, p. 6 (hereafter cited as Escambia County Review).

[156] 7 C.F.R. § 1822.88(q) (1977).

[157] Peer comments.

[158] Escambia County review.

[159] Ibid.

[160] Peer comments.

This Commission agrees that a strong outreach program would be appropriate, combined with a continued monitoring of that program by OEO. However, an affirmative outreach program should extend beyond advertising in local newspapers to other potential sources of tenant referral, such as local welfare offices and social service agencies. Moreover, improved tenant selection procedures may also be called for. If the review had determined the causes of the existing housing patterns, this Commission could have made more specific recommendations.

In the other review in Alabama, the reviewer did not make any findings or recommendations concerning deficiencies in the county FmHA program. The review described activity with regard to rural housing (single-family) loans. It reported that loans to blacks and whites "were determined by need and repayment ability," but did not show any statistical analysis to document this assertion.[181]

Although the review did not find any deficiencies, the information contained in the review provided clear evidence of civil rights violations in the county and failure of FmHA to make any effort to eliminate those violations. The review stated:

> Most of the black borrowers who received FmHA financing were members of a self-help housing project. The county supervisor stated that, for the most part, White landowners would not sell individual housing lots to Blacks. Consequently, Blacks usually could not obtain new housing unless a housing organization bought the land in parcels and made it available to Black families.[182]

It should not have been necessary for blacks to join together to buy parcels of land as their only means of purchasing land from whites. In this Commission's view, the Department of Agriculture has a responsibility to ensure that its borrowers have not been discriminated against in their selection of lots for housing.[183]

The review gave no indication that the Department of Agriculture had tried to assist the black applicants in combating discrimination. The review also gave no indication whether the refusal of white landowners to sell individual lots to blacks had been reported to the Department of Justice for investigation and civil action. Further, there appeared to have been no investigation by OEO to determine if the "land parcels" being made available by white landowners to the black self-help housing project were contiguous and thus furthering segregation or scattered throughout the community helping to foster integration. It would appear that the Department of Agriculture has a responsibility, which it is not exercising, to advise its borrowers of their rights to equal opportunity and of steps to protect those rights.

C. Complaint Investigations

Since June 15, 1977, the total responsibility for investigating civil rights complaints has been with the Office of Equal Opportunity.[184] Title VI complaints regarding FmHA programs may be filed with any FmHA office or with the Secretary of Agriculture within 180 days of the alleged incident.[185] They are then forwarded to the Equal Opportunity Director of FmHA with any supporting information.[186] Title VIII complaints against FmHA employees or borrowers also are routed through FmHA's Equal Opportunity Director.[187] Within 5 days, FmHA must send copies of the complaint to OEO, which determines whether an investigation is necessary. Upon determining whether a complaint should be investigated, OEO may ask FmHA to make a preliminary inquiry, developing specific information. This report must be returned to OEO within 30 days. OEO then decides whether a full investigation is necessary to resolve the complaint. At the insistence of OEO, the FmHA Equal Opportunity Officer now provides a brief analysis along with the preliminary inquiry report.[188]

According to an OEO official, FmHA has not been very thorough in its investigation of complaints.[189] Often it investigates only part of the complaint. Furthermore, it does not do any analysis of the information it acquires in its investigations, but merely passes it on to OEO. OEO has to return

[181] Lowndes County, Alabama, Multi-Agency Review, Mar. 30, 1976, pp. 5-6.
[182] Ibid.
[183] Indeed, FmHA requires its borrowers to so certify. (See the section of this chapter on certifications.)
[184] Peer interview; Payne interview. Prior to 1977 the Office of Investigation of the Department of Agriculture was responsible for investigating all complaints arising from program operations, including those of FmHA.
[185] 7 C.F.R. § 1901.202(h)(1) (1977).
[186] 7 C.F.R. § 1901.202(h)(2) (1977).
[187] 7 C.F.R. § 1901.203(d)(1) (1977). Complaints against packagers, contractors, or others eventually go to the Department of Housing and Urban Development. 7 C.F.R. § 1901.203(d)(2) (1977).
[188] Peer comments.
[189] Peer interview.

EXHIBIT 5.4

Fair Housing Complaints Received by FmHA

Fiscal Year	Black	Hispanic	Native American	Asian American	Non-minority	Sex/Marital Status	Total
1976	40	5	2		1	23	71
1977	67	9	4	1	8	54	143
1978	7	1	1		3	9	21
Total	114	15	7	1	10	86	235

Source: U.S., Department of Agriculture, response to U.S. Commission on Civil Rights questionnaire, Dec. 12, 1977.

many complaints to FmHA because the preliminary inquiry is incomplete.[170]

Most fair housing complaints concern allegations of discrimination against blacks or on the basis of sex or marital status (see exhibit 5.4). Of 235 housing complaints received during fiscal years 1976, 1977, and 1978 (through mid-December 1977), 222 involved single-family housing.[171] As of December 6, 1977, there were only 64 unresolved complaints[172] and 8 investigations were in process. As of March 1978, two findings of discrimination were reported by FmHA and were pending investigation.[173] As of mid-December 1977, there had been no fair housing violations found as a result of complaints.

V. Internal Reviews

There are at least two types of reviews concerned with the internal operations of Farmers Home Administration—program operations reviews and audits. Both include evaluation of FmHA activities to ensure fair housing compliance. Program operations reviews may be conducted by a national team comprised of FmHA staff outside the State to be reviewed,[174] a team comprised of a variety of staff[175] from within the State to be reviewed, or district directors.[176] The purposes of these reviews include:

- determining compliance with basic loan making and servicing policies;[177]
- indicating current or potential program deficiencies or irregularities;[178]
- determining training needs;[179] and
- indicating counties or programs requiring special attention.[180]

The regulations for these reviews do not specifically discuss review of compliance with civil rights laws. As part of the reviews conducted by State review teams, the reviewers use a questionnaire[181] which provides little help in uncovering fair housing violations. Only four questions are related to fair housing:

- Are applications by race or ethnic group in approximate proportion to that of the community population statistics?[182]
- Are civil rights requirements being met in the use of organization loan facilities?[183]

[170] Ibid.
[171] FmHA response.
[172] Peer interview.
[173] Dana Froe, Supervisor of Complaints, Compliance and Enforcement Division, OEO, Department of Agriculture, interview, Mar. 13, 1978.
[174] 7 C.F.R. § 2006.601(a) (1977).
[175] 7 C.F.R. § 2006.601(b) (1977).
[176] 7 C.F.R. § 2006.601(c) (1977).
[177] 7 C.F.R. § 2006.602(a) (1977).
[178] 7 C.F.R. § 2006.602(b) (1977).
[179] 7 C.F.R. § 2006.602(c) (1977).
[180] 7 C.F.R. § 2006.602(d) (1977).
[181] FmHA Form 401-1 supplied by Mark Nestle, Director, Program Evaluation Staff.
[182] Part I: Application, Question 2.
[183] PART III: Supervision and Security Servicing, Question 43.

• Are agency and building facilities available without regard to race, religion, color, or national origin?[184]

• Does each employee have a copy of the "USDA Employee Handbook" and appendices I and II, "Employee Responsibilities and Conduct" and "Equal Employment Opportunity," respectively?[185]

The questions require "yes" or "no" answers and allow the reviewer to make remarks. There are no guidelines as to what constitutes a negative answer or how the information necessary for answering the questions should be obtained. Moreover, FmHA procedures do not state that, where there are negative responses to the questionnaire, corrective action must follow. They state only:

> The State Director will insure that. . .(5) Necessary corrective actions are taken promptly on operational weakness disclosed by the operations reviews.[186]

> District Directors will. . .(2) Report serious problems immediately to the State Director.[187]

The Director of the Program Evaluation Office indicates that "any usual civil rights problems" uncovered by the operations reviews would be reported to the Administrator and to the FmHA Equal Opportunity Staff.[188]

An examination of 38 reports of reviews conducted in 1976 by national review teams indicates that these reviews are not satisfactory for spotlighting possible civil rights violations. National reviews of statewide operations are normally conducted in 5 days, and the review team can visit only a small sample of local FmHA facilities.[189] Of the 38 reports, only 1 cited a civil rights problem in the rural housing program: equal opportunity signs were not found at construction sites visited by review team members, a relatively minor infraction.[190]

The second type of internal review of Farmers Home Administration activities is the audits conducted by the Department of Agriculture's Office of Audit.[191] The purposes of these audits are to: determine whether program policies and procedures are adequate and conform to applicable laws and regulations;[192] provide objective reviews of effectiveness of operations;[193] and determine reliability of data and reports.[194]

Guidelines for conducting county office audits contain a few relatively comprehensive sections pertaining to fair housing and civil rights enforcement.[195] For example, the part of the Audit Guide covering investigation of program irregularities instructs the auditor to:

> Visit the local welfare office and/or locally-funded Office of Economic Opportunity (OEO) office—Community Action organizations—and interview officials to determine:
>
> (c) The general reputation of [FmHA] in the area including its reputation with respect to providing loan assistance to low income and minority families. . . .[196]

In the "Audit of Loan Processing and Applicant Eligibility" section, auditors are told: "Be alert for indications of discrimination. Interview selected applicants to resolve questionable case."[197] In the section of the credit guidelines concerning rural housing program management, auditors are told to analyze files to determine whether the office is reaching a "commensurate proportion" of minority families.[198] They are also instructed to review rejected applications, including those of minorities, to determine whether those rejected because of insufficient income might have been eligible for an interest credit.[199]

In the section of the guidelines pertaining to loan servicing and supervision, auditors are directed to ensure that "nondiscrimination agreements were obtained,"[200] and that "on-site compliance reviews were timely performed and reported."[201] Auditors are also told to compare loan servicing, including management assistance, for minority and white borrowers, being "alert for indications of discrimina-

[184] Part VI: Business Services, Question 13.
[185] Part VII; Personnel, "Employee Management Relations," Question 22.
[186] 7 C.F.R. § 2006.603(b) (1977).
[187] 7 C.F.R. § 2006.603(c) (1977).
[188] Mark Nestle, Director, Program Evaluation Staff, FmHA, interview, Dec. 12, 1977.
[189] Gordon Cavanaugh, FmHA Administrator, memorandum to Thomas R. Watson, equal opportunity specialist, U.S. Commission on Civil Rights, Jan. 6, 1978, with 1976 program operation reviews attached, Jan. 6, 1978.
[190] Ibid.
[191] The General Accounting Office also has responsibility for conducting audits. 7 C.F.R. § 2012.9 (1977).
[192] 7 C.F.R. § 2012.3(a)(1) (1977).
[193] 7 C.F.R. § 2012.3(a)(2) (1977).
[194] 7 C.F.R. § 2012.3(a)(3) (1977).
[195] U.S., Department of Agriculture, Office of the Inspector General, "Inspector General Audit Guide 7004.1: FHA County Office" (rev. August 1972), § 8.1.
[196] Ibid., § 8.3e(2).
[197] Ibid., § 9.4b.
[198] Ibid., § 10.4b.
[199] Ibid., § 10.4v.
[200] Ibid., § 11.4c(1).
[201] Ibid., § 11.4c(2).

tion in the kind and quality of servicing activities and management activities provided minority borrowers," and of unequal treatment of delinquent cases.[202]

The audit instructions also direct that liaison efforts with the public, including minorities, are to be reviewed to determine the extent of efforts to inform the public of program availability.[203] Auditors are also told to look at efforts made to: advise minorities of the requirements for nondiscrimination; "prominently display the nondiscrimination posters"; inform minorities of new programs or changes; "publicize Civil Rights success stories"; and ensure that all public material indicates that programs will be operated on a nondiscriminatory basis.[204]

The Audit Guide is deficient in several ways:

- Although the guide advises auditors to "be alert" for discrimination, it does not provide any instruction as to what constitutes discrimination. The Audit Guide does not direct auditors to examine the reasons for rejection of applications.
- USDA has not taken advantage of audit workpapers as a potential tool for evaluating compliance by the county office with fair housing requirements. Audit workpapers are prepared for every application the auditors review. They contain detailed information about the amount and type of each loan. However, USDA has not required that they include information on the race, ethnicity, or sex of the borrower.
- The guidelines were last revised in 1972 and do not contain any information regarding implementation of the Equal Credit Opportunity Act or the Title VIII amendment. They do not mention reviewing loans and applications by the sex of the applicant.

FmHA wrote to this Commission:

> With regard to comments in the report related to agency deficiencies with respect to the Equal Credit Opportunity Act, the following actions have been or are being taken:
>
> (a) The Office of General Counsel has identified agency programs which are classified as "special purpose credit programs."
>
> (b) An FmHA task force, chaired by the Deputy Administrator for Program Operations with an attorney from the U.S. Department of Justice Task Force on Sex Discrimination providing technical guidance, is currently preparing and rewriting all FmHA instructions, guidelines, forms, written policies, pamphlets, brochures, etc., which contain sexist terminology and nuances that could conceivably lead to discrimination.
>
> (c) FmHA has made available for public consumption in its field offices approximately 40,000 copies of Equal Credit Opportunity Act guidelines and prohibitions. These same guidelines, written in the Spanish language, are being made available in areas with significant numbers of Spanish-speaking residents. Too, FmHA is in the final stages of preparation of an Equal Credit Opportunity Act training package, and each employee will receive such training with the least possible delay when the training package is delivered.
>
> (d) Appropriate changes have been made to applicable loan application forms to assure that data elements necessary to monitor program information, as required by the Equal Credit Opportunity Act, will be collected.[205]

Although the Office of Audit is supposed to coordinate its efforts with FmHA's Equal Opportunity Director, the latter official stated that the Office of Audit has not asked him to review audit guidelines for coverage of fair housing issues in 2 or 3 years.[206] It has not independently undertaken such a review. Any finding of possible discrimination is to be reported to the FmHA Equal Opportunity Director and to OEO. The Office of Audit is supposed to use subsequent audits to determine whether FmHA has taken appropriate corrective action.[207] According to the FmHA Equal Opportunity Director, the Office of Audit has reported no more than three civil rights violations in the last 2 years. These have generally involved technical requirements, such as failing to make a report prior to a deadline date.[208] According to OEO, the Office of Audit has not reported any possible discrimination in FmHA programs since February 1976.[209]

[202] Ibid., § 11.4g.
[203] Ibid., § 12.4c.
[204] Ibid., § 12.4f.
[205] Cavanaugh comments.
[206] Tippins interview, Dec. 9, 1977.
[207] Lester Gottlieb, Office of Audit, Department of Agriculture, telephone interview, Jan. 30, 1978.
[208] William Tippins, telephone interview, Mar. 6, 1978.
[209] Peer interview.

Chapter 6

DEPARTMENT OF DEFENSE

Summary

Under the auspices of the Department of Defense (DOD) housing program, all major military service installations operate housing referral offices (HROs), which assist eligible military personnel and their families in finding off-base housing. DOD Directive 1100.15 describes the obligation of the military services to ensure that off-base housing available to military personnel is offered on a nondiscriminatory basis. Although the directive requires the four military services—the Army, Navy, Air Force, and Marine Corps—to issue implementing instructions, these instructions are not required to be issued promptly.

Almost 1,000 people in DOD and the four service branches have some fair housing duties, but most of these are staff of the housing referral offices. Very few are engaged full time in fair housing work and there is no formal fair housing training program for HRO staff. The four services' budgets are not correlated with the need for fair housing services, as measured by the number of persons using off-base housing services or the number of housing units listed by the HROs.

For housing units to be listed with an HRO, the owner or manager must agree to an assurance of nondiscrimination. Although DOD and the service branches place heavy reliance on this procedure, the assurances suffer from a number of serious shortcomings, including:

- They are not required to be in writing, and only one of the services, the Air Force, even expresses a preference for written assurances.
- Discriminatory conduct toward civilians is not a violation of the assurance, although such conduct might discourage military personnel from applying for housing.
- Although, where no assurance is provided, the housing unit cannot be included in the referral listings, it is not off limits to military personnel.
- Compliance with fair housing assurances is not monitored systematically. The services rely primarily on individual complaints to determine if discrimination is occurring, notwithstanding the fact that complaints are not reliable indicators of discrimination in housing.

DOD procedures for complaint investigation are, on the whole, quite thorough in that they permit "testing" to determine if discrimination has occurred and require a detailed interview with the complainant. However, the DOD complaint investigation procedures fail to adequately instruct compliance officers as to how to investigate problems other than outright denial of housing as, for example, harassment or unequal terms and conditions in rental agreements.

If, after a complaint has been investigated, a base commander determines that discrimination has occurred, all housing owned and/or operated by the agent found to be discriminating is placed under a restrictive sanction, that is, placed off limits to military personnel for a minimum of 180 days. The effect of the restrictive sanction, however, is limited because it does not apply to military personnel already residing in housing maintained by the discriminatory agent, housing contracts entered into prior to the finding of discrimination, or to civilian employees of the military. Moreover, the fact that the sanction can only be lifted for "exceptional circumstances" during the 180-day period does not encourage compliance before the end of that period. After 180 days, the lifting of the sanction is conditioned merely on the discriminatory agent signing another nondiscrimination assurance. There are no requirements for specific actions such as

adoption of procedures for affirmative marketing of dwellings to both sexes and all racial and ethnic groups. There are no requirements for an independent compliance review of the agent's facilities.

DOD and the service branches do not collect sufficient information to evaluate their fair housing programs. Army and Marine Corps headquarters staff responsible for fair housing conduct only infrequent onsite visits to various bases to evaluate fair housing programs, and the Navy and Air Force conduct none. There are no data on: 1) the percentage of military personnel living in all minority, nonminority, or integrated neighborhoods; 2) the number of agents who refuse to sign assurances of nondiscrimination; 3) the types of complaints received; 4) the average processing time for complaints; 5) the extent of complaint backlogs; or 6) the methods used for allocating fair housing resources.

I. Housing Services

The Department of Defense (DOD) has the responsibility for providing or assisting military personnel in acquiring suitable housing for themselves and their families.[1] To accomplish this task, DOD has developed a family housing program that services primarily military personnel and, under certain circumstances, civilian personnel of DOD as well.[2]

Under this program, designed primarily to aid military personnel and their families to secure suitable housing, DOD's policy is to rely to the maximum extent possible on the local housing markets near military bases or installations.[3]

Thus, off-base housing is the major focus of the family housing program, and an off-base housing program was established to "assure that military personnel authorized to reside off-base are quickly, adequately, suitably, and economically housed in quarters within reasonable proximity of their duty stations."[4] The off-base housing program also provides assistance to single personnel when adequate on-base housing is unavailable.

Under the off-base housing program each major installation[5] must establish a housing referral office and maintain listings of available rental and for sale property within commuting distance.[6] At smaller installations, housing referral services are provided to the extent needed, often using the housing referral office at a larger installation in the area, or assigning a military person to provide the services in the absence of an HRO. Additionally, in areas with several installations, a single joint housing office may be established to serve all installations.[7]

The housing referral office is responsible for surveying the market within commuting distance of the base to determine the availability of housing,[8] particularly rental housing. Available units are listed along with pertinent information such as number of bedrooms, distance from the base, parking facilities, and whether children or pets are permitted.[9] These listings are maintained by the housing referral office and are used as referrals for personnel authorized to live off-base.[10] They are to be checked by HRO staff

[1] 42 U.S.C. § 1501 (1970). A copy of this report was provided in draft form to Department of Defense officials in August 1978. In response, DOD wrote to this Commission:

> We greatly appreciate both the opportunity to comment on our portion of the draft and the challenge [Commission] staff accepted in updating the 1974 report. Their research for the DOD chapter involved reams of directives, instructions, regulations, and reports plus numerous personal interviews. We are pleased with their effort. The comments at the attachments have been provided either to clarify areas of misinformation or misunderstanding from research materials or to provide additional information on the operation and scope of the DOD housing referral program. M. Kathleen Carpenter, Deputy Assistant Secretary, Department of Defense, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 23, 1978 (hereafter cited as Carpenter letter).

This Commission notes that these comments are reflected throughout the report.

[2] Housing services are provided to DOD civilian employees who are transferred from one place of residence to another because of job requirements, recruited for job opportunities away from their current place of residence in the United States, or employed outside the United States and are United States citizens. DOD Instruction 1100.16, Equal Opportunity in Off-Base Housing, enclosure 2, p. 1, June 2, 1977 (hereafter cited as DOD Instruction 1100.16).

[3] Department of Defense Instruction 4165.45, Determination of Family Housing Requirements, Jan. 19, 1972, p. 2 (hereafter cited as DOD Instruction 4165.45). The words "base" and "installation" are used interchangeably throughout this chapter.

[4] 32 C.F.R. § 239a.1 (1976).

[5] Major installations are those military facilities to which more than 500 military personnel are assigned.

[6] 32 C.F.R. § 239a.3(a) and b.5(a)(1) (1976). Commuting distance is defined as the distance measured from the administrative area of the installation that can be traversed by privately-owned vehicles in 1 hour or less during rush hours. DOD Instruction 4165.45, enclosure 2, p. 1.

[7] Where a single office is not appropriate, one office may be designated as the coordinating office for the area. 32 C.F.R. § 239a.3(a) and (b), 239b.6(a) and (b) (1976).

[8] The housing referral office concentrates on rental housing, since many military personnel either for economic or personal reasons prefer to rent dwellings rather than purchase them. However, assistance is also provided to those interested in purchasing housing.

[9] DOD Form 1667, Detailed Sales/Rental Listing Card, Nov. 1, 1973.

[10] All DOD military personnel are instructed on their orders to report and be processed through "the appropriate housing referral office prior to the execution of a commitment for obtaining private housing." DOD Instruction 4165.51, p. 3, enclosure 2, p. 1. If the individual does not want assistance from the housing referral office, a documented statement to this effect is obtained. If assistance is desired, the applicant completes an Off-Base Housing Application DOD Form 1668, Nov. 1, 1973.

periodically for accuracy and currency and removed when the facilities are no longer available.[11]

Where there is a question of fitness, the housing is also inspected to determine its environmental suitability, including health and safety conditions. If the property is found to be substandard, it is classified as nonreferrable and cannot be listed at the housing referral office.[12]

Further services are often available from the off-base housing offices upon request. For example, a person in search of housing is assisted "as necessary in locating, mapping, and marketing the listings he has chosen." The individual is provided with information on the neighborhood in which he or she wishes to reside, including its school system, available transportation, churches, and recreational facilities.[13] All military personnel are also counseled on the standards of conduct expected when they reside off base, and they are advised that the housing referral office can provide a mediation service in the event of any agent/tenant dispute.[14]

The housing referral office is also responsible for maintaining liaison with the community, including the real estate industry and community officials and organizations involved in housing.[15] The community is to be kept informed of military housing needs and to be encouraged to provide open housing for all military personnel.[16] This liaison provides the housing referral office with information on community housing and services available to interested military personnel.

II. Fair Housing Responsibilities

A. Statutory Responsibilities

The Department of Defense is obligated to ensure equal housing opportunity for those who obtain housing through the off-base housing referral services.[17] There are a number of sources of authority for this responsibility. Title VIII of the Civil Rights Act of 1968 prohibits discrimination because of race, color, religion, sex, or national origin in the sale or rental of housing.[18] Title IX of the same act prohibits the intimidation of or interference with any person because of their activities in support of fair housing.[19] The Civil Rights Act of 1866 provides that all citizens shall have the same rights enjoyed by white citizens in purchasing, leasing, selling, and conveying real and personal property.[20] Although none of these laws give DOD any direct responsibility for enforcement, Title VIII does require that all executive departments and agencies of the Federal Government, including the Department of Defense, operate their programs and activities relating to housing and urban development in a manner that affirmatively supports and enhances equal housing opportunity.[21]

An additional mandate for ensuring equal opportunity in the off-base housing program stems from DOD's own policy as articulated in DOD Directive 1100.15, "The Department of Defense Equal Opportunity Program." This directive states that the Department of Defense "actively opposes arbitrary discrimination based on race, color, religion, sex, age, or national origin."[22] It also requires all DOD components to enforce the equal opportunity provisions of the directive in all policies, programs, and at all levels of activity, including housing.[23]

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[11] Ibid. Military personnel are to report to the housing referral office when they rent or purchase housing or when they fail to locate suitable housing. DOD Form 1670, Nov. 1, 1973. Similarly, real estate agents are requested to advise the housing referral office when a unit listed with an HRO is no longer available for rent or sale.

[12] DOD Instruction 4165.51, Housing Referral Offices and Services, Nov. 29, 1973, p. 3 (hereafter cited as DOD Instruction 4165.51).

[13] DOD Instruction 4165.51, enclosure 2, pp. 2–4. A representative of the base commander, such as a unit sponsor, is available to assist newly assigned personnel in their search for housing. Housing referral office personnel are generally not assigned this duty.

[14] DOD Instruction 4165.51, enclosure 2, p. 4. All personnel are provided with a pamphlet entitled "The Military Tenant" that outlines the standard of conduct.

[15] DOD Instruction 4165.51, enclosure 2, p. 5. The instruction states that "contacts should include, but not be limited to local government officials, real estate boards, fair housing boards, and representatives of the Federal Housing Administration and Veterans Administration."

[16] Ibid.

[17] As discussed in chapter one, the scope of this report does not extend to equal opportunity in housing provided by Federal agencies for military personnel or civilian employees.

[18] Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*

[19] Title IX of the Civil Rights Act of 1968, 42 U.S.C. § 3617.

[20] 42 U.S.C. § 1982. On June 17, 1968, the Supreme Court held in Jones v. Mayer and Co. that this provision of the 1866 civil rights law "bars all racial discrimination, private as well as public, in the sale or rental of property." 392 U.S. 409 (1968).

[21] Sec. 808(d) of the Civil Rights Act of 1968, 42 U.S.C. § 3608(d).

[22] DOD Directive 1100.15, Department of Defense Equal Opportunity Program, June 3, 1976, p. 2.

[23] Ibid.

B. The DOD Fair Housing Program

Pursuant to these authorities, DOD operates a program for equal opportunity in off-base housing.[24] The essence of the program is that in order for housing to be listed with an off-base housing referral service, the agent[25] for the housing must give an assurance that the facility is available to all military personnel without regard to race, color, religion, national origin, or sex.[26] DOD Instruction 1100.16, "Equal Opportunity in Off-Base Housing," outlines the specific requirements of the fair housing program.[27]

The instruction states that DOD has responsibility to ensure equal treatment and opportunity for its personnel and that where discrimination has been observed,[28] commanders must impose "restrictive sanctions," that is, order military personnel not to enter into a new contract to reside in the facility. Complaint processing, including evaluation and investigation, is prescribed in the instruction as the basic method of determining that discrimination has occurred. It is notoriously unreliable as an indicator of discrimination.[29] Although Instruction 1100.16 requires an approved update of listings, it does not provide for systematic reviews of fair housing policies and practices with regard to the dwellings listed.

Upon reporting to the housing referral office as instructed on military orders, all military service persons are to be informed of the military's fair housing program. The service person is also to be counseled as to various methods that may be used by agents to discriminate against minorities and women, such as arbitrarily refusing to consider the applicant as a tenant or falsely stating that the unit was just rented to another applicant.[30] Service personnel are also advised to report to the housing referral office immediately any suspected act of discrimination.[31]

C. Service Regulations

All military service components of DOD—the Departments of the Army, Air Force, and Navy, and the Marine Corps[32]—are bound by the general policies set out in DOD directives and instructions. According to established operating procedures, each of the military services issues instructions reiterating DOD policies and describing how these are to be implemented at the service level. Thus, DOD's Instruction 1100.16 is backed by service instructions that essentially restate the goal of eliminating discrimination against DOD military and civilian personnel in off-base housing.[33] These instructions describe procedures to be used by the services for obtaining voluntary nondiscrimination assurances, handling discrimination complaints (including investigations and informal hearings), imposing restrictive sanctions, and submitting semiannual progress reports.[34]

Separate service instructions are often not issued in a timely manner. Instruction 1100.16 was first issued in February 1973, with an effective date of September of that year.[35] The Marine Corps, Army, Air Force, and Navy instructions were not issued until October 1973, November 1973, January 1974, and May 1974, respectively.

However, Instruction 1100.16 was revised in June 1977 in order to provide alleged discriminatory agents with an opportunity for an informal hearing.[36] The purpose of the revision was to standardize procedures for implementing the 1973 version of Instruction 1100.16, which required that due process be offered to alleged discriminatory agents. Nonetheless, regardless of the 180-day period, the effect is

[24] Indeed, prior to the passage of Title VIII, DOD had made provision for equal housing opportunity in the off-base housing program pursuant to its policy of nondiscrimination. The fair housing program was first established in 1967. Col. Dale Eppinger, Deputy Director for Policy, Analysis, and Requirements, interview at the Pentagon, Dec. 5, 1977 (hereafter cited as Eppinger interview). The initial guideline for the program was a DOD memorandum, Equal Opportunity for Military Personnel in Rental of Off-Base Housing, Apr. 11, 1967. In 1969 these guidelines were formalized as an "instruction," carrying more weight than a "memorandum."
DOD's fair housing program as it was first established is evaluated in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort* (1970), pp. 172–73.

[25] The agent is the real estate agency, manager, landlord, or owner of a housing facility. DOD Instruction 1100.16, enclosure 2, p. 1.

[26] DOD Instruction 4165.51, enclosure 2, p. 1.

[27] DOD Instruction 1100.16.

[28] DOD Instruction 1100.16, enclosure 7, p. 7.

[29] The unreliability of complaints as an indicator of discrimination is discussed in the chapter of this report on the Veterans Administration.

[30] DOD Instruction 1100.16, enclosure 4, p. 1.

[31] Ibid.

[32] The military departments are the Air Force, Army, and Navy. The Marine Corps is under the jurisdiction of the Secretary of the Navy but it operates its own housing program.

[33] Air Force Regulation 30–8, Equal Opportunity in Off-Base Housing, Jan. 3, 1974; Army Regulation 600.18, Equal Opportunity in Off-Post Housing, Nov. 19, 1973; Navy Instruction 5354.1, Equal Opportunity in Off-Base Housing, May 29, 1974; and Marine Corps Order P5354.1, Equal Opportunity in Off-Base Housing, Nov. 8, 1976 (hereafter cited as Air Force Regulation 30.8, Army Regulation 600–18, Navy Instruction 5354.1, and Marine Corps Order P5354.1).

[34] Ibid.

[35] DOD Instruction 1100.16, Equal Opportunity in Off-Base Housing, Feb. 28, 1973.

[36] DOD Instruction 1100.16. In addition, the revision updated reporting requirements (discussed below) and emphasized liaison with other Federal, State, and local agencies.

to delay implementation. To illustrate, as of mid-December 1977, only two of the services—the Air Force and Navy—had prepared separate instructions pursuant to the revised Instruction 1100.16 and then only in draft form.[37] The Marine Corps was in the process of reviewing their instruction to determine if changes were necessary, and the Army had not yet begun to change its instructions.[38] Thus, as of mid-December 1977, the service instructions were again out of date.

Lack of timeliness in service instructions to implement this policy was countenanced by Instruction 1100.16 itself. Instruction 1100.16 merely directs the service to issue their instructions within 180 days after its effective date,[39] which was September 1977. This means that 9 months elapsed from June 1977, the date the revised Instruction 1100.16 was issued, before formal direction regarding the implementation of the new provisions was required from the services.

DOD has observed:

> Regardless of when a directive is issued, the DOD instruction is effective on the effective date or on receipt. It becomes the governing policy at that time regardless of when services publish instructions. . . .Further, the 180 day period to revise service instructions is not peculiar to 1100.16 but is the procedure in effect within [the Office of the Secretary of Defense]. The time frame is not one used to ignore the directive. . .but rather a period to develop service unique procedures to implement this policy.[40]

The services are encouraged to issue less formal "interim changes" covering those aspects of the revised instruction that are new or different from the 1973 instruction.[41] However, it appears that, as of early 1978, not all of the services had done so.[42]

III. Organization, Staffing, and Budget

A. Organization

Overall responsibility for the formulation of DOD policy relating to equal opportunity in off-base housing rests with the Assistant Secretary of Defense for Manpower Reserve Affairs and Logistics.[43] Fair housing policy applicable to all DOD components is set forth in instructions and directives issued by the Department of Defense.[44]

Major responsibility for the implementation of equal opportunity in off-base housing policy rests with each of the military departments. The Deputy Assistant Secretary of Defense for Equal Opportunity is to provide guidance for and coordinate fair housing activities among the military services. Nevertheless, the Deputy Assistant Secretary has no supervisory responsibility to implement policy for the military departments.[45]

Within the military services, several levels of responsibility exist for the equal opportunity in off-base housing program. These are at headquarters in all services,[46] with the major commands[47] in the Air Force, Army, and Navy and at installations in all services.

The service headquarters are responsible for developing regulations to implement the policy set by the Deputy Assistant Secretary, monitoring the operations of the program at bases, and coordinating with DOD and the other services as appropriate. In addition, service headquarters consolidate base-level information into semiannual reports, maintain files of substantiated discrimination complaints, and perform other recordkeeping functions.[48]

[37] Air Force response to U.S. Commission on Civil Rights questionnaire, Dec. 19, 1977 (hereafter cited as Air Force response). Navy response to U.S. Commission on Civil Rights questionnaire, Dec. 23, 1977 (hereafter cited as Navy response).

[38] Charles T. Carter, Housing Management Officer, U.S. Army, interview at the Pentagon, Dec. 20, 1977 (hereafter cited as Carter interview).

[39] DOD Instruction 1100.16, p. 4.

[40] Carpenter letter.

[41] Memoranda containing "interim changes" to departmental and service installations may be issued by the services to provide guidance and direction to personnel until revised service instructions are issued. Colonel Dale Eppinger, Deputy Director for Policy, Analysis, and Requirements, telephone interview, Jan. 26, 1978.

[42] The Army indicated that some "interim changes" were issued, but these did not include implementation of the informal hearing procedures. Carter interview. Because the Air Force has concentrated on revising its instruction and because it had emphasized most of the new provisions of 1100.16 all along, it did not consider issuance of "interim changes" essential. Captain Terrell Berkovsky, U.S. Air Force, Chief, Off-Base Housing Policy Section, telephone interview, Jan. 3, 1978 (hereafter cited as Berkovsky telephone interview).

[43] Carpenter letter. The Office of the Deputy Assistant Secretary of Defense for Equal Opportunity reports to the Office of the Assistant Secretary of Defense (Manpower Reserve Affairs and Logistics), which in turn reports to the Secretary of Defense.

[44] Eppinger interview.

[45] Ibid.

[46] Headquarters are the Offices of the Secretaries of the Air Force, Army, and Navy, and the Office of the Commandant of the Marine Corps.

[47] Commands are organized on a task basis within the United States and on an area basis overseas. They are responsible for organizing, administering, equipping, and training their subordinate elements for the accomplishment of assigned missions.

[48] Lt. Marcia A. Fulham, U.S. Navy, Equal Opportunity Officer; Lt. Commander C.F. Reeves, U.S. Navy, Equal Opportunity Officer; Lt. Daniel J. Rowe, U.S. Navy, Navy Housing Referral Officer; W.L. Howard, U.S. Navy, Housing Management Officer; Virginia Hillsmeier, U.S. Army, Housing Management Officer; Lt. Colonel Edward Weber, U.S. Marine Corps, Head, Equal Opportunity Office; Capt. Edward Baker, U.S. Marine Corps, Equal Opportunity in Off-Base Housing Officer; Capt.

The major commands are essentially a second level of oversight for installation activities. They can be responsible for such activities as receiving fair housing reports from the bases, monitoring the fair housing program at the base level, and coordinating fair housing activities among the installations within their jurisdiction. Their specific assignments vary among the services.[49]

At the base level, the equal opportunity in off-base housing program is the responsibility of base commanders.[50] In this regard, DOD Instruction 1100.16 lists five responsibilities of commanding officers: 1) ensuring nondiscrimination in referring DOD personnel to off-base housing, 2) identifying and soliciting nondiscrimination assurances for housing facilities within the commuting area of the base, 3) ensuring that an office and staff are available to advise DOD personnel of the existence of the equal opportunity in off-base housing policy and program, 4) reviewing periodically the installation's off-base housing procedures and policies to ensure effectiveness and compliance, and 5) cooperating fully with other Government agencies investigating housing discrimination complaints filed by DOD personnel.[51]

However, DOD observes that the above responsibilities are not all inclusive and that the full range of the responsibilities are further detailed in the implementing instructions issued by the military services.[52] Thus, additional base commander responsibilities include, but are not limited to, maintaining liaison with and seeking the cooperation and support of local leaders in the implementation of the equal opportunity in off-base housing program, imposing restrictive sanctions, monitoring compliance by military personnel, and preparing and submitting semiannual housing reports.[53] Although commanders have been assigned these major responsibilities at the base level, it is the HROs which are in charge of the day-to-day administration of the program.[54]

B. Staffing

As shown in exhibit 6.1, almost 1,000 people within the Department of Defense, including the military departments, have some fair housing responsibility. Most of these people are attached to the base housing referral offices.

1. Office of the Deputy Assistant Secretary of Defense for Equal Opportunity and Service Headquarters

In the Office of the Deputy Assistant Secretary of Defense and in the Navy and Marine Corps, development of fair housing policy for the off-base housing program is the responsibility of equal opportunity staff whose duties extend to other civil rights matters, such as affirmative action and equal employment opportunity programs, but who have no direct role in the oversight or management of the off-base housing program.[55] On the other hand, at the Air Force and Army headquarters, development of policy for equal opportunity in housing is the responsibility of staff who also have duties for implementation of the other aspects of the off-base housing program.[56]

One person in the Office of the Secretary of Defense is assigned responsibility for equal opportunity in off-base housing.[57] This is the Deputy Director for Policy, Plans, and Analyses, who reports to the Deputy Assistant Secretary for Equal Opportunity. The incumbent devotes approximately

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Jeffrey Zimmerman, U.S. Marine Corps, Family Housing Operations Officer, interview at Naval Annex, Dec. 16, 1977 (hereafter cited as Fulham and others interview). Capt. Terrell Berkovsky, Chief, Off-Base Housing Policy Section, and Lt. Col. Bruce Ballif, Chief, Facilities Utilization Branch, interview at the Pentagon, Dec. 19, 1977 (hereafter cited as Berkovsky and Ballif interview). Only two of the military services actually specify in their implementing regulations what headquarters responsibilities are and under whose direction they will be carried out. Air Force Regulation 30-8 (p. 8). The Housing Utilization Branch has responsibility for policy and broad staff supervision of the program within the Air Force; coordination with other staff agencies, major commands, military departments, and Federal agencies; forwarding reports and discrimination complaint summaries to DOD; and submitting semiannual reports. Similarly, Navy Instruction 5354.1 (p. 2) indicates that the Chief of Naval Operations will provide overall policy guidance and review program implementation. In addition, the Chief of Naval Materiel, in the program administration of the Housing Referral Services, is to ensure that the equal opportunity in off-base housing program is effectively implemented within his area of responsibility.

[49] For example, Air Force Regulation 30-8 (pp. 2-3) indicates that major commands are responsible for the following:

(1) Implementing program policies and procedural guidance.

(2) Monitoring and supervising the operation, administration, and effectiveness of the program.

(3) Establishing controls, as required, to insure that implementation of fair housing policy by installations overseas is accomplished with due regard to the provisions of any international agreement or local law of the foreign country concerned.

(4) Forwarding reports and complaint summaries received from installations of the command.

Navy Instruction 5354.1 (pp. 2-3) states that those Naval district commandants and area commanders designated as housing coordinators are responsible for coordinating installations within their area with other military services and monitoring discrimination complaints.

[50] A commander is "The military or civilian head of any installation, organization, or agency of DOD who is assigned responsibility for the off-base housing program." DOD Instruction 1100.16, enclosure 2.

[51] DOD Instruction 1100.16, p. 3.

[52] Carpenter letter.

[53] Air Force Regulation 30-8, pp. 2-3; Army Regulation 600-18, pp. 1-2; Navy Instruction 5354.1, pp. 2-4; and Marine Corps Order P5354.1, pp. 4-14.

[54] DOD Instruction 4165.51; DOD Instruction 1100.16, enclosure 4.

[55] Eppinger interview; Fulham and others interview.

[56] Berkovsky and Ballif interview; Carter interview.

[57] Eppinger interview.

EXHIBIT 6.1

Number of Staff and Percentage of Staff Time Allocated to Fair Housing

Percentage of staff time	Office of the Secretary of Defense	Air Force	Army	Navy	Marine Corps	Total staff headquarters
Headquarters						
100%	0	0	0	0	0	
More than 50%	0	1	0	0	0	
10–50%	1	0	1	1	0	
Less than 10%	0	1	0	0	3	
Total	1	2	1	1	3	8
Below headquarters						**Total staff below headquarters**
100%		226	0	0	0	
More than 50%	NA	53	0	0	0	
10–50%		80	342	0	24	
Less than 10%		28	0	176	3	
Total		387	342	176	27	912

NA = Not applicable

Sources: DOD, Air Force, Army, Navy, and Marine Corps response to U.S. Commission on Civil Rights questionnaire, 1977, and M. Kathleen Carpenter, Deputy Assistant Secretary of Defense, letter to Louis Nuñez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 23, 1978.

20 to 25 percent of his time to the fair housing program.[58] The Air Force has two persons at headquarters assigned responsibility for equal opportunity in off-base housing.[59] The Army, Navy, and Marine Corps each have one.[60]

In the Air Force, the Chief of the Off-Base Housing Policy Section is assigned responsibility for fair housing.[61] The Chief devotes more than 50 percent but less than 100 percent of her time to the equal opportunity in off-base housing program.[62] The Chief's immediate supervisor, the Chief of Facilities Utilization Branch, devotes from 10 to 50 percent of his time to fair housing as well.

The Army's fair housing duties are the responsibility of the Housing Management Officer in the Office of the Director for Human Resources Development. This Army officer has responsibility for all family housing services and devotes more than 10 percent but less than 50 percent of his time to the equal opportunity in off-base housing program.[63]

At Navy headquarters, an action officer in the Equal Opportunity Division, under the overall supervision of the Assistant Deputy Chief of Naval Operations for Human Resources Development, is responsible for the equal opportunity in off-base housing program.[64] The fair housing responsibilities constitute approximately 20 percent of the action officer's workload.[65]

At Marine Corps Headquarters, an action officer in the equal opportunity section, under the overall supervision of the Deputy Chief of Staff for Manpower, is responsible for equal opportunity in off-base housing. Other aspects of housing fall under the purview of the Housing Management Officer. Less than 10 percent of this officer's time is devoted to fair housing.[66]

[58] DOD response to U.S. Commission on Civil Rights questionnaire, Dec. 16, 1977 (hereafter cited as DOD response).
[59] Air Force response.
[60] Carpenter letter.
[61] Air Force response.
[62] Ibid.
[63] Department of the Army, response to the U.S. Commission on Civil Rights questionnaire, Dec. 23, 1977 (hereafter cited as Army response).
[64] Navy response. A total of 11 officers in the Equal Opportunity Division are assigned various equal opportunity responsibilities.
[65] Lt. Marcia A. Fulham, Action Officer, Equal Opportunity Division, Bureau of Naval Personnel, telephone interview, Jan. 5, 1978. Responsibility for the off-base housing program rests with the Chief of Naval Materiel.
[66] Carpenter letter. Responsibility for the off-base housing program rests with the Housing Management Section, Office of the Deputy Chief of Staff for Installations and Logistics. Capt. Edward Baker, U.S. Marine Corps, Equal Opportunity in Off-Base Housing Officer, telephone interview; Capt. Jeffrey Zimmerman, Family Housing Operations Officer, U.S. Marine Corps, telephone interview, Jan. 5, 1978.
[67] Eppinger interview.

2. Commands and Bases

Below headquarters the staffing patterns are similar for each of the four military services. On all major installations, the housing referral office staff is responsible for carrying out the functions of the off-base housing program including equal opportunity.[67] On most major installations one or two full-time persons are assigned housing responsibilities with other persons assigned part-time duties.[68] The equal opportunity in off-base housing program is one of the responsibilities of the housing referral officer who reports to the housing manager.[69]

The Army has a total of 130 installations in the continental United States with 80 full-time housing referral offices.[70] As of June 30, 1977, the Army's major commands[71] and installations had a total of 342 persons assigned to fair housing duties that occupied from 10 to 50 percent of their time.[72] There were 24 vacancies.[73]

The Air Force has a total of 175 major installations,[74] including 156 with full-time housing referral offices.[75] As of June 30, 1977, the Air Force major commands[76] had a total of 21 persons assigned fair housing responsibility: 2 spent more than 50 percent but less than 100 percent of their time on fair housing; 10, more than 10 percent but less than 50 percent; and 9, less than 10 percent.[77]

At the Air Force installations, a total of 387 persons were assigned to fair housing activities. Of these, 226 were assigned full-time; 53 were assigned more than 50 percent of their time but less than 100 percent; 80, between 10 and 50 percent; and 28, less than 10 percent.[78] There were 24 vacant positions.[79]

The Navy has a total of 133 installations, including 58 with full-time housing referral offices.[80] A total of 176 persons at the base level spend

[68] Ibid.
[69] Depending upon the size of the installation, the duties of the housing referral officer and the housing manager may be performed by one person.
[70] Army response.
[71] There are 10 major commands in the U.S. Army. Each major command has a counterpart to the Army headquarters' housing management officer.
[72] Army response.
[73] Ibid.
[74] Major installations, in this instance, are those with 100 or more assigned military personnel. Berkovsky and Ballif interview.
[75] Ibid.
[76] There are 13 major commands in the U.S. Air Force. Each Air Force major command has a housing division and a housing referral officer.
[77] Air Force response.
[78] Ibid.
[79] Ibid.
[80] An additional 50 installations have a person assigned responsibility for housing. William L. Howard, Housing Management Officer, Naval Facilities Engineering Command, telephone interview, Jan. 6, 1978.

approximately 10 percent of their time on equal opportunity in off-base housing.[81]

The Marine Corps has a total of 10 installations with full-time housing referral offices.[82] They employ a total of 27 persons, 24 full time and three part time.[83] The 24 full-time persons spend between 10 and 50 percent of their time on fair housing duties; the corresponding figure for the part-time staff is less than 10 percent.[84]

These data demonstrate that the amount of time spent on fair housing is significantly different for each service. The Air Force has the greatest number of staff with fair housing duties. The Air Force and Marines are the only services with headquarters staff personnel who devote more than 50 percent of their time to fair housing.[85] The Air Force is the only one with any staff persons assigned full time to fair housing.[86]

The base housing referral offices are frequently staffed with GS 7 to 9 level civil service personnel.[87] The Army Housing Management Officer stated that at times these low ranks negatively affected the program, because housing referral personnel in lower grade levels were intimidated by the educational background and business knowledge of those people they were required to investigate.[88]

C. Training

There is no established formal program to train HRO staff in housing, and particularly in equal opportunity, at DOD or in the military services.[89] The training that is provided is informal and less than comprehensive. Where it exists, it consists basically of housing workshops or conferences sponsored jointly or separately by the military services.[90] The workshops have included presentations and discussions on the equal opportunity in off-base housing policy and program, covering such topics as discrimination complaints, investigations procedures, semiannual report requirements, and fair housing compliance and enforcement.[91]

In response to this Commission's inquiries as to the extent of fair housing training, only the Army and Air Force stated that additional training opportunities were also provided. The Army, for example, sponsors a 3-week housing course that is open to housing referral program personnel from the various military services.[92] However, this course devotes only 1 day to fair housing training. The Air Force stated that it offers a 2-week family housing management applications course, sends housing staff to participate in HUD fair housing conferences around the country, and holds local Housing Referral Officers' Associations meetings 1 day every quarter.[93] However, neither the Army nor the Air Force indicated the extent to which these activities covered fair housing issues.

D. Budget

No precise data appear to exist on the Government's expenditures to assure the rights of military personnel to nondiscriminatory off-base housing. Some data are available, but they are based on estimates by the military components[94] and are not an accurate accounting of expenditures.

One estimate is printed in the *Special Analyses of the Budget.* According to the most recent *Special Analyses,* the Government will spend $2.5 million for military fair housing in fiscal year 1979. However, when staff from this Commission contacted the component services for the purposes of obtaining separate data for each, it was unable to confirm the

[81] Carpenter letter.
[82] Baker telephone interview.
[83] Navy response; Marine Corps response to U.S. Commission on Civil Rights questionnaire, Dec. 23, 1977 (hereafter cited as Marine Corps response).
[84] Ibid.
[85] Carpenter letter.
[86] Comparison of information provided by the various services in their responses to the U.S. Commission on Civil Rights questionnaire.
[87] Carter interview and Carpenter letter.
[88] Ibid.
[89] The Army has plans to institute a formal course of instruction to begin during fiscal year 1979 at Fort Lee, Virginia. Army response.
[90] These conferences are held in both the continental United States and in Europe. Although their frequency and duration varies, the military departments estimate that they take place two times per year, and last 3 to 5 days. No data on the number of staff members trained were available from the services. Air Force, Army, Navy, and Marine Corps responses.
[91] DOD headquarters and service headquarters personnel having fair housing responsibilities and representatives from HUD and DOJ make these presentations. "Air Force-Army-Navy-Marine Corps-Coast Guard Housing Referral Workshop" agenda, Philadelphia, Pa., Sept. 27-29, 1977. See also, Department of the Air Force, "Joint Service Housing Referral Workship" agenda, Garmisch, Germany, Nov. 7-9, 1977.
[92] There are seven of these courses per year, each having 40 students. Navy HRO staff have attended this course. Navy response.
[93] Air Force response.
[94] *Budget of the United States, Special Analyses of the Budget, Fiscal Year 1979,* Special Analysis N, Federal Civil Rights Activities, p. 283. It should be noted that in previous years, the *Special Analyses* have estimated much larger expenditures for military fair housing. The figures were $6.1 million and $6.5 million for fiscal years 1977 and 1978, respectively. *Budget of the United States, Special Analyses of the Budget, Fiscal Year 1977,* p. 237, and *Fiscal Year 1978,* p. 248. However, these figures were apparently in error. The Department of the Army had been reporting its entire off-base housing program as a fair housing expenditure. Adrienne Quenneville, Budget Examiner, Office of Management and Budget, telephone interview, Feb. 8, 1978.

$2.5 million figure. The Air Force indicated that it would spend $1.4 million[96] and the Navy, $0.3 million.[98] The Army was not yet able to estimate its 1979 budget,[97] and the Marine Corps could only state that it would spend between $41,800 and $209,000.[98]

As shown in exhibit 6.2, budget estimates for all services were available for fiscal years 1977 and 1978. For these years the fair housing budgets of the Air Force and the Army were each about $1 million, considerably larger than the budgets of the Navy and the Marines, which were under $300,000.

As shown in exhibit 6.3, the service budgets are not well correlated with the need for fair housing services, measured as the number of persons using the off-base housing services or the number of facilities from which assurances must be gathered. The extent of the budget discrepancies are most evident when comparing the amount spent on fair housing with the number of military persons served by the programs. Estimates of the expenditures per person ranged from $2.27 in the Navy to almost three times that amount—$6.67—in the Air Force.

IV. Compliance Mechanisms

A. Assurances

One of the primary elements of the fair housing program is that housing referral office employees are required to obtain assurances of nondiscrimination from agents.[99] These assurances, given verbally[100] or in writing, are very narrow as they are limited to a promise not to discriminate against military personnel only. They state: "All housing units listed by me with the Housing Referral Office at [installation] are open to all military personnel without regard to race, color, sex, religion, or national origin."[101]

DOD observes:

> For [Department of Defense] purposes, the assurances are not narrow since the housing program is for military personnel of that installation. . . .The base Commander's authority in this area lies in the health, morale, and welfare interests of the military personnel assigned. HUD has the responsibility for fair housing practices and policy of the general public.[102]

However, any racial, ethnic, or sex discrimination practiced in a facility where military personnel might potentially live could serve to foster discrimination against minority or female military personnel by discouraging them from even applying for housing. The narrow scope of the DOD assurances does not communicate to agents the need for eliminating all discrimination against minorities and women from all rental or sales practices in housing eligible for military occupancy. Instead, the assurances reflect DOD's policy to limit its concerns to specific acts of discrimination against military personnel. As a result of this narrow interpretation, DOD has not established procedures to receive lists of housing facilities which it approves for military off-base housing in which other Federal agencies have found uncorrected discrimination. Thus, it does not routinely determine if the discrimination in these facilities in any way affects military personnel.

All four of the services leave serious loopholes in this voluntary nondiscrimination procedure. The Army regulation explicitly states that an agent can "refuse" to provide a written nondiscrimination assurance and still have his or her housing facilities listed if a verbal assurance is given.[103] The regulations of the Air Force, Navy, and Marine Corps are stronger on this point, in that they do not explicitly permit listing where agents "refuse" to sign assurances. However, the regulations are still vague. They indicate that if written nondiscrimination assurances are "unobtainable" when owners verbally espouse a policy of nondiscrimination, their facilities can be listed.[104] They do not define the term "unobtainable." Of the four services, only the Air Force prefers written nondiscrimination assurances and discourages verbal ones.[105]

The power of DOD's assurance procedures is very limited. When agents refuse to give an assurance, their dwellings will not be listed with the HROs. However, military personnel are not restricted in their choice of dwellings to only those listed with the HROs. Thus, dwellings of agents who

[96] Air Force response.
[98] Navy response.
[97] Army response.
[98] Marine Corps response.
[99] DOD Instruction 1100.16.
[100] DOD Instruction 4165.51, enclosure 2, p. 1. Verbal assurances are to be documented by a statement signed by a housing referral employee that an explicit oral assurance of nondiscrimination has been provided by the agent.
[101] The reverse side of DOD Form 1667, Detailed Sales/Rental Listing, provides a standard certification for nondiscrimination.
[102] Carpenter letter.
[103] Army Regulation 600-18, p. 2-1.
[104] Air Force Regulation 30-8, p. 5; Navy Instruction 11101.21C, Navy Housing Referral Service, July 1977, enclosure 2, p. 2.
[105] Berkovsky telephone interview.

EXHIBIT 6.2

Military Budgets for Off-Base Housing and Fair Housing, Fiscal Years 1977 and 1978

	Fiscal Year 1977			Fiscal Year 1978		
Air Force						
Off-base housing	$3,649,000			$ 4,723,000		
Fair housing	$ 944,000			$ 1,212,000		
Percent for fair housing	25.9			25.7		
Army						
Off-base housing	$ 3,948,000			$ 4,025,000		
Fair housing	$ 1,184,400			$ 1,207,500		
Percent for fair housing	30.0			30.0		
Navy						
Off-base housing	$ 2,366,376			$ 3,450,000		
Fair housing	$ 189,310			$ 276,000		
Percent for fair housing	7.9			8.0		
Marine Corps						
Off-base housing	$ 378,000			$ 394,000		
Fair housing	$ 37,800	–	$ 189,000	$ 39,400	–	$ 197,000
Percent for fair housing	10.0	–	50.0	10.0	–	50.0
Total						
Off-base housing	$10,341,376			$12,592,000		
Fair housing	$ 2,355,510	–	$2,506,710	$ 2,734,900	–	$2,892,500
Percent for fair housing	22.8	–	24.2	21.7	–	23.0

Sources: Air Force, Army, Navy, and Marine Corps responses to U.S. Commission on Civil Rights questionnaire, 1977.

EXHIBIT 6.3

Per Person Expenditures for Fair Housing, Departments of the Air Force, Army, and Navy,* Fiscal Year 1977

	Fair housing budget fiscal year 1977 (full year)	Number of rental facilities surveyed July 1, 1976, to June 30, 1977 (full year)	Number of military personnel serviced Jan. 1, 1977, to June 30, 1977 (six months)	Estimated fair housing expenditures per military personnel serviced
Air Force	$ 944,000	38,711	70,711	$6.67
Army	1,184,400	20,637	106,184	5.58
Navy	189,310	21,843	41,752	2.27

*Comparable data were not available for the Marine Corps.

Sources: Air Force, Army, and Navy responses, and Air Force, Army, and Navy Housing Referral Reports, July 1, 1976, to Dec. 31, 1976, and Jan. 1, 1977, to June 30, 1977.

refuse to sign assurances do not become off limits to military service personnel.

DOD explains the reasons for this limitation:

> The power of DOD's assurance procedure is necessarily limited to this refusal [to list dwellings of agents who refuse to give assurances] since no further adverse action can be taken against an agent by the housing office without just cause (a complaint or other information indicating discrimination). Military personnel are not restricted in their choice of dwellings to only those listed with the HRO's. To do so would be a conflict of interest, the HRO as a sole housing source, and an abridgment of the military member's personal freedom. It is therefore possible for military personnel to deal with agents who have refused to sign assurances since no cause for restriction pre-existed. A subsequent complaint of discrimination by military personnel seeking housing provides the cause for investigation and possible restriction of the facility by the installation commander.[106]

B. Investigations

DOD Instruction 1100.16 requires that investigations be conducted in response to two situations.[107] First, suspected discriminatory acts,[108] such as statements made to HRO staff by agents that they will not rent to minorities, acts reported by local agencies, and discriminatory actions publicized in local media are to be considered a valid basis for investigation. These investigations can be conducted in the absence of formal housing discrimination complaints.[109] However, they are nonetheless ad hoc. Even though they are initiated by HRO staff, they appear not to be conducted in a periodic or systematic way, but only initiated as the need arises. They cannot be construed as regularly scheduled compliance reviews encompassing an evaluation of all aspects of the equal opportunity in off-base housing program.

DOD has commented:

> Regular compliance inspections are neither feasible nor within the scope of the DOD charter for fair housing. As mentioned earlier, the HRO can only investigate when just cause exists. Even without the provision for just cause, a major aspect of the installation commander's responsibility is the maintenance of a relationship with the local community that will assure a continued supply of suitable off-base housing for military personnel at affordable

[106] Carpenter letter.
[107] DOD Instruction 1100.16, p. 2.
[108] Ibid.
[109] Ibid.

> prices. It would be impossible for this key DOD manager, tasked with the morale, welfare, and health responsibility for base personnel, to on the one hand manage a systematic housing compliance inspection program off the installation in the local area, and on the other hand, work with community leaders to expand local housing markets for military families. It is for this reason that enforcement beyond HRO complaint processing is rightfully the responsibility of HUD.
>
> . . .Strong assurance procedures or a DOD-run compliance program would be damaging to other aspects of the installation commander's duties, particularly community liaison. The local commander's authority as a guarantor for assurances or for enforcement (to impose sanctions, etc. . .) is not provided by law but comes from his/her position as guardian of health, morale, and welfare of assigned personnel. It is deemed appropriate, therefore, to use this authority only when those situations stipulated in 1100.16 are evident.[110]

Thus, compliance reviews are not conducted as a routine matter by the military services,[111] although they can often be an effective tool for uncovering discriminatory practices that would otherwise go unnoticed.

Second, oral or written complaints reported to HRO staff by military tenants or prospective tenants are to be investigated promptly.[112] Upon receipt of such a complaint, HROs are directed immediately to notify the base commander of the complaint and, within 3 working days to initiate a preliminary inquiry that is informal but must include sufficient detail to indicate whether discrimination has occurred.[113] The procedures to be followed in the conduct of an inquiry are: 1) interview the complainant regarding the details and circumstances surrounding the alleged discriminatory act; 2) verify the existence of a vacancy by telephoning or personally visiting the facility or agent concerned;[114] 3) request approval from the base commander for the use of verifiers who will again visit the facility and attempt to identify the basis for the discrimination;[115] 4) counsel the complainant of the right to pursue further action through local, State, or other Federal agencies such as the Department of Housing and Urban Development (HUD) or the Department of Justice (DOJ);[116] 5) provide information to personnel seeking off-base housing regarding agents or facilities under investigation; and 6) write and submit a preliminary report to the base commander on the results of the preliminary inquiry indicating the actions taken.[117]

These fair housing complaint procedures are more thorough than those of some other Federal agencies with fair housing responsibilities, including the Veterans Administration and the General Services Administration.[118] The complaint procedures also represent an improvement over DOD procedures several years earlier, when the use of independent verifiers was prohibited.[119] The required interview with the complainant and independent investigation of the agent are both very positive features.

The procedure for handling discrimination complaints described in the services' implementing instructions appears to be limited to investigations of discriminatory practices that result in the denial of rent/lease or for sale property to DOD personnel.[120] No emphasis is placed on investigating other types of discriminatory practices, such as harassment, or differing requirements in the terms and conditions of rental agreements, terms of sales contracts, and tenant assignments. Many of these other practices

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[110] Carpenter letter.

[111] Air Force, Army, Navy, and Marine Corps responses.

[112] In the event housing discrimination complaints are initially filed with base agencies or representatives such as the equal opportunity officer, unit commander, or supervisor, they must be referred immediately to the HROs for appropriate action. DOD Instruction 1100.16, enclosure 4, pp. 1–2.

[113] DOD Instruction 1100.16, enclosure 4, p. 2.

[114] Verification is to be made in cases where the complaint is received shortly after the alleged discriminatory act took place and when the complaint involves denial of the existence of a vacancy. DOD Instruction 1100.16, enclosure 4, p. 2.

[115] Volunteer verifiers are to be used for determining the existence of vacancies and whether or not discrimination has occurred as alleged. Specifically, they are asked to isolate the basis of the discrimination—race, color, religion, sex, or national origin. Ideally, two verifiers should be used, one possessing characteristics similar to those of the complainant. Verifiers are to be instructed by HRO personnel on the provisions of DOD's equal opportunity in off-base housing program, on the specific housing requirements of the complainant, and on the information to be obtained from owners or agents regarding their rental procedures. Furthermore, they are to be instructed on how to write their reports. Verifiers are not to make any verbal or written commitments for the rental of the facility involved. DOD Instruction 1100.16, enclosure 4, pp. 3–4.

[116] Complaints to HUD are to be filed on HUD Form 903. If necessary, HROs are to provide assistance to complainants in completing this form. Whether or not a complainant decides to file a complaint with HUD, the HRO must thoroughly investigate the matter. DOD Instruction 1100.16, enclosure 4, p. 2.

[117] Ibid.

[118] See chapters on these agencies in this report.

[119] Earlier DOD policies are discussed in *The Federal Civil Rights Enforcement Effort*, pp. 172–74.

[120] Air Force Regulations 30–8, Army Regulation 600–18, Navy Instruction 5354.1; and Marine Corps Order P5354.1.

may indeed persist and should be discussed in the military complaint processing procedures.[121]

DOD Instruction 1100.16 requires that complete files be maintained on substantiated as well as unsubstantiated complaints. These files are to contain all pertinent data such as the complainant's statement, verifier's report, preliminary inquiry report, summary of any informal hearings, statement of legal review,[122] commander's decision, and copies of notifications to the parties. In cases where allegations of discrimination are not substantiated, these files are to be kept at the base for 24 months.[123] When allegations are found to be valid, the complaint file, along with a memorandum from the commander,[124] is to be forwarded through the service headquarters to the Office of the Deputy Assistant Secretary of Defense for Equal Opportunity.[125]

Investigation files on substantiated complaints provided to this Commission by each of the services appear to be complete. A review of these files indicates that the complaint handling procedures outlined in the service instructions were generally followed, the allegations were well documented, and all the relevant documents pertaining to the complaint and investigation were included.[126]

Since files on unsubstantiated complaints are not maintained in Washington, Commission staff were, for the most part, unable to assess the adequacy of the investigation and findings where base commanders had determined that no discrimination occurred. One of the services, however, did forward to the Commission three complaints of discrimination that it believed it had been unable to substantiate.[127] These files also showed that the complaint handling procedures outlined in the service instructions were generally followed, and that relevant documents were included. Nonetheless, a review of the files indicated some possible problems:

- Overreliance on the absence of other complaints against the alleged discriminators with HUD or other agencies.
- Acceptance of the statements of the alleged discriminators without evidence to corroborate their excuses.
- A tendency to equate the "friendliness" or "sincerity" of the alleged discriminator toward the investigator with absence of discrimination against the complainant.

All three of the complainants subsequently turned to HUD for assistance. In two of the cases HUD found discrimination, confirming the view that the military investigations of these two complaints were inadequate. However, HUD did not effect systemic changes in the practices of the agents found to be discriminating.[128] In the light of the "inability of HUD to force action in these two cases," DOD has observed that "it appears the statement. . .that the military investigations were inadequate is unfair and incorrect."[129] However, this Commission stands by its conclusions about the two military investigations. DOD's assertion appears to be based upon the incorrect assumption that HUD's failure to obtain compliance demonstrates that HUD's investigations were of no better quality than those of the military. However, as discussed in the chapter in this report on the Department of Housing and Urban Development, HUD lacks enforcement power under Title VIII and thus cannot require corrective action, regardless of the quality of its investigations. Moreover, HUD's lack of enforcement power makes it especially important that Federal agencies such as DOD, which can take sanctions, exercise that power appropriately to ensure that the Title VIII violations

[121] Indeed, absent independent investigation, service persons are unlikely to perceive such problems.

[122] A legal review is to be conducted following the inquiry and informal hearing but prior to the commander's rendering a decision. The record is reviewed for content and completeness. DOD Instruction 1100.16, enclosure 4, p. 5.

[123] Eppinger interview. Unsubstantiated complaint files may be forwarded to HUD and DOJ at the complainant's request. DOD Instruction 1100.16, enclosure 4, p. 6.

[124] The commander's memorandum is supposed to outline the efforts made to obtain housing for the complainant, the impact of the restrictive sanction on the equal opportunity in off-base housing program, and on DOD personnel and their families, and any other information deemed relevant. DOD Instruction 1100.16, enclosure 4, p. 7.

[125] Ibid., p. 10. Complete investigative reports on substantiated complaints are to be submitted to the Assistant Secretary from each military department no later than 45 days after the case is forwarded to the department from the base.

[126] It should be noted that only investigatory files on substantiated complaints were reviewed. Files on unsubstantiated complaints were not available from DOD or from three of the services because these remain at base level.

[127] Because the other services did not provide unsubstantiated complaints to this Commission, no comparison of the quality of the complaint handling of the four services can be made. Therefore, in the interest of fairness to the one service which complied with this Commission's request for unsubstantiated complaints, its identity is not revealed in this publication.

[128] In one instance, the complaint was successfully conciliated, but the complaint involved only $350 in damages to the complainant. The agent was not required to take any affirmative action to ensure against discrimination in the future. In the other case, HUD was unsuccessful in reaching conciliation. The complainant was informed of his right to bring suit in Federal court. Theodore Simmons, Director of Compliance, and Maria Selcedo, Equal Opportunity Clerk, San Francisco Regional Office, Department of Housing and Urban Development, telephone interviews, Feb. 17, 1978.

[129] Carpenter letter.

they uncover are promptly corrected. Indeed, because the military did not find discrimination in its own investigations of these two cases, the facilities involved were not placed on restrictive sanctions. Thus, the military continued to allow its personnel to live in housing facilities in which discrimination against military personnel had been demonstrated.

C. Informal Hearings

It is the responsibility of the base commander to review the investigative file and, based on the facts uncovered during the preliminary inquiry, make a determination as to whether or not discrimination occurred. Prior to making a determination that discrimination occurred, however, the commander is instructed to convene and preside at an informal hearing, at which time the alleged discriminatory owners or agents and/or their legal representatives are afforded an opportunity to present evidence on their own behalf.[120] The commander may also determine that more information is required. If so, an officer outside the HRO may be appointed to conduct a further inquiry.[121]

If, at any point, the commander determines that the alleged discriminatory act is not substantiated, the case is closed and the complainant is so informed in writing.[122] This does not preclude the complainant from pursuing the matter further by submitting a complaint to HUD or DOJ or by bringing a private civil suit in a State or Federal court.[123] If an informal hearing substantiates the commander's finding of discrimination, the owner or agent is notified through command correspondence of the commander's decision and is once again advised of DOD's policy and requirements of equal opportunity in off-base housing.[124]

DOD has informed this Commission that "complainants can appeal through the military chain of command through the Inspector General."[125] However, DOD instructions do not outline any appeal procedure to be followed by the complainants within the military service in cases where they disagree with a commander's finding of nondiscrimination. Similarly, no procedure is described which allows agents to appeal a commander's decision.[126]

D. Restrictive Sanctions

Housing becomes off limits to military personnel in those instances where the base commander determines that the agent for that housing has practiced discrimination based upon race, color, national origin, religion, or sex. In those cases, all facilities owned and/or operated by the agent are placed on a restrictive sanction list for a minimum of 180 days[127] and are also removed from the HRO listing of available housing. All military personnel are prohibited from entering into a new contract with the agent.[128]

All personnel who are assisted by the housing referral office are provided with a copy of the restrictive sanction list and advised not to rent, lease, purchase, or reside in any of the listed facilities.[129] The restrictive sanction list is also disseminated by means of housing referral office briefings, base newspapers, daily bulletins, commander calls, and social action programs.[140] Furthermore, other military installations within the same commuting area are advised when restrictive sanctions are imposed on a facility.[141]

Nonetheless, as with assurances, the power of the restrictive sanction is also somewhat limited. First, the restrictive sanction does not apply to military personnel residing in a facility at the time the

[120] Written notification is to be given to the alleged discriminatory owner or agent, specifying the nature of the complaint and advising him or her of the right to request an informal hearing within 5 working days after the notification. In the event there is no such request within the specified time frame, the lack of response is considered a waiver of the right to such a hearing. If there is a hearing, the owner or agent, his or her attorney, the complainant, his or her attorney, the equal opportunity officer, the HRO representative, or other designated persons may attend. DOD Instruction 1100.16, enclosure 4, p. 4.

[121] This officer, if not an attorney, will be provided legal assistance by the judge advocate, who is counsel for the base. Ibid., p. 5.

[122] Ibid.

[123] Ibid., p. 6.

[124] Ibid.

[125] Carpenter letter.

[126] A civil suit relating to an agent's right to contest a commander's decision to impose restrictive sanctions was filed against the Army in a district court in Texas in 1974. In Connell v. Shoemaker, a Texas landlord filed suit after the Fort Hood commander had imposed restrictive sanctions based on a finding of discrimination. One of his allegations was that the Army's refusal to provide him with the opportunity for a formal hearing violated his due process rights. Because the suit was filed after expiration of the 180-day sanction, the district court ruled that the complaint was moot and dismissed the case. On appeal, the court of appeals reversed the district court ruling holding that "a 'live' controversy as to the due process question subsists between the parties and thus warrants consideration of the merits." The case was remanded to the district court for further consideration. Connell v. Shoemaker, 555 F.2d 483 (1977).

[127] DOD Instruction 1100.16, enclosure 4, p. 6.

[128] Ibid., p. 8.

[129] Ibid. The military person is to sign an acknowledgment of receipt of the restrictive sanction list. DOD Form 1668. If a military person "intentionally" takes residency in a restricted facility, the base commander is to take appropriate disciplinary action. However, this action is not specified in DOD Instruction 1100.16.

[140] Air Force response; Army response; Navy response; Marine Corps response. Listings of restrictive facilities are to be disseminated whenever a facility is added to the list.

[141] DOD Instruction 1100.16, enclosure 4, pp. 6–7.

sanction is imposed or to the extension or renewal of a contract entered into prior to the imposition of the sanction.[142] DOD observes that this is because it believes "it would be unfair to require families to move and resettle during the period of the sanction. . . .The purpose of the sanction is to penalize the agent or the owner, not the military families already occupying the facility."[143] Second, the restrictive sanction is not binding on any civilian employees, who may purchase or rent a dwelling regardless of its presence on the restrictive sanction list. When a base commander imposes restrictive sanctions, the agent is notified of the action, and that the sanction will be removed in 180 days if he or she provides a written nondiscrimination assurance.[144]

While the imposition of sanctions for a full 180 days seems to be a reasonable penalty for violating an earlier commitment not to discriminate, it provides no incentive to agents to correct their discriminatory practices prior to the expiration of that time. In the alternative, DOD could, for example, offer to shorten that time where the agent could demonstrate a sustained absence of discrimination. It could also provide incentive for agents to adopt more substantial steps to guard against the recurrence of discrimination, such as the adoption of procedures for the affirmative marketing of dwellings to both sexes and all racial and ethnic groups.[145]

DOD does not agree. It wrote to this Commission:

> We do not concur with the suggestion of reduced sanctions. While no incentive for an agent's rapid change of policy is offered, the 180-day sanction precludes situations from arising where promises and assurances are given and then broken or ignored.[146]

As discussed later in this report, the 180-day period does not preclude broken or ignored promises. After 180 days, the agent found to have discriminated is required to do nothing more than sign a new assurance, similar to the one previously disregarded.

This Commission is not suggesting that DOD lift sanctions prior to 180 days on the basis of new promises or assurances. Rather, what would be appropriate would be the lifting of sanctions when the agent demonstrates that the discrimination has been corrected and that methods of preventing discrimination in the future are firmly in place.

According to DOD Instruction 1100.16, restrictive sanctions can be removed prior to the expiration of the 180 days in "exceptional circumstances." In such cases, an approval waiver can be obtained by the HRO from the head of the DOD component.[147] However, nothing in Instruction 1100.16 indicates that this provision can be routinely used to encourage prompt correction of discriminatory practices and affirmative commitment to fair housing. Indeed, the instruction gives no indications of what constitutes the "exceptional circumstances" under which such a waiver is to be granted.[148]

E. Followup and Monitoring

Once restrictive sanctions have been imposed, commanders are required to take the following actions: 1) cooperate with other Federal, State, or local agencies during their investigations; 2) maintain liaison with those agencies to determine the status of complaints; 3) ensure that the complainant is informed of actions taken on the complaint; and 4) ensure that military personnel comply with the restrictive sanctions.[149]

To monitor compliance with restrictive sanctions by military personnel, HRO staff are required to determine where military members locate housing.[150] At minimum, HRO staff must closely screen information provided by personnel on the required "Notification of Housing Selection" form.[151]

There are, however, no requirements or procedures for regular monitoring of agents' compliance

[142] Ibid., p. 8. However, relocation of the military tenant to a new unit within the restricted facility without the written approval of the base commander is prohibited.
[143] Carpenter letter.
[144] DOD Instruction 1100.16, enclosure 4, p. 9.
[145] Affirmative marketing procedures include, as a minimum, such steps as advertising in minority media, displaying posters announcing a fair housing policy, and recruiting sales staff from among both sexes and all racial and ethnic groups. Affirmative marketing procedures are discussed in the chapters in this report on the Department of Housing and Urban Development, the Veterans Administration, and the Farmers Home Administration.
[146] Carpenter letter.
[147] DOD Instruction 1100.16, enclosure 4, p. 9. However, DOD Instruction 1100.16 fails to specify how or by whom a waiver request is initiated. The term, head of the DOD component, refers to the Secretaries of the Army, Air Force, and Navy.
[148] Ibid.
[149] This includes developing and implementing a procedure through which personnel are counseled concerning restrictive sanctions, periodically publishing a list of facilities under restrictive sanctions, and taking appropriate disciplinary action against personnel who knowingly violate the sanctions. DOD Instruction 1100.16, enclosure 4, pp. 8–9. Appropriate disciplinary action is determined by base commanders. At the Air Force, for example, appropriate disciplinary action can range from counselling sessions, to withholding pay, to attempts to have personnel move from the facility to court martial. Berkovsky and Ballif interview.
[150] DOD Instruction 1100.16, enclosure 4, p. 8.
[151] Ibid.

with assurances, even those assurances that have been signed when restrictive sanctions are lifted. Agents are presumed to be in compliance with these assurances unless the services have information to the contrary.[152] Any monitoring is only done on an informal basis.[153]

Assurances are to be checked annually for "adequacy."[154] This annual check is part of the housing referral office's responsibility to keep listings up to date. In the process of checking on the currency of listings, HROs ask the agents whose dwellings are listed if the assurance of nondiscrimination continues to be in effect. However, inquiries do not include independent reviews of the agents' policies and practices, because DOD believes such practices are beyond the authority of its program.

The failure to monitor compliance with assurances by agents who were once on the restrictive sanction list is particularly inappropriate, since the agent need only sign the same assurance he or she had previously violated in order to be removed from the list. Given the agent's proven disregard for the assurances signed earlier, the mere signing of another assurance seems little guarantee of fair housing practices in the future.

V. Program Evaluation

A. Reporting Systems

DOD Instruction 1100.16 requires each of the military departments to submit semiannual reports to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) for the 6-month periods ending on June 30 and December 31.[155] However, these reports require only such information as the following:

- The number of housing facilities surveyed during the reporting period.
- The number of housing facilities listed during the reporting period.
- The number of housing facilities placed under restrictive sanctions during the reporting period.
- The total number of facilities under restrictive sanctions as of the reporting date.
- The number of complaints processed during the reporting period.

In addition, the services are required to describe any significant equal housing activities, problems, or experiences.[156] The services pass these reporting requirements on to the bases.

The June 1977 revision to Instruction 1100.16 also requires a report of the number of restrictive sanctions lifted prior to the 180-day minimum and the number of complaints referred to the Departments of Housing and Urban Development and Justice.[157]

From past reports, it can be seen that the Air Force has the most active fair housing program. As shown in exhibit 6.4, from the period between July 1, 1976, and June 30, 1977, the Air Force listed more than 40,000 new facilities, which involved obtaining assurances of nondiscrimination from each of them. The Air Force processed more than half of the total number of complaints handled by all the military services and was responsible for almost two-thirds of all restrictive sanctions imposed.

As shown in exhibit 6.5, the Air Force was also more active than the other services in removing agents from the restrictive sanction list. As of December 31, 1976, 176 facilities were on the Air Force's restrictive sanction list, and during the next 6 months 31 new facilities were added. However, as of June 30, 1977, only 151 facilities remained on the list; 56 had been removed—more than one quarter of the facilities on the list at some time during the reporting period.

This contrasts with the Department of the Army, which had 230 facilities on its restrictive sanction list as of December 31, 1976, and added 19 new sanctions during the next 6 months. As of June 30, 1977, the Army had a list of 213 facilities under restrictive sanctions, since it had removed only 36 sanctions—less than 15 percent of those on the restrictive sanction list—during this reporting period. The fact that so many agents remain on the restrictive list for more than 180 days indicates that restrictive sanctions may not be effective as a tool to influence agents to eliminate discriminatory policies.

In the absence of more comprehensive reporting requirements, the headquarters of the services and the Department of Defense do not have adequate

[152] The Air Force indicates that, absent information to the contrary, an agent is presumed to be adhering to the assurance of nondiscrimination. Inquiries are conducted only when there are reasons to suspect otherwise. Air Force response. The Navy states that it has no specific policy relating to monitoring of agents who have signed nondiscrimination assurances. Like the Air Force, the Navy also presumes that an agent is complying with DOD policy until a discrimination complaint is filed. Navy response.

[153] Berkovsky and Ballif interview.

[154] DOD Instruction 4165.51, enclosure 2, p. 2.

[155] DOD Instruction 1100.16, enclosure 4, p. 10.

[156] Ibid., p. 11. For the purposes of this Instruction, DOD defines "facilities" as single-family dwelling units.

[157] Ibid., p. 10.

EXHIBIT 6.4

Fair Housing Activities of the Military Services, July 1, 1976–June 30, 1977

	New rental facilities listed (Assurances obtained)	Complaints processed	Number of facilities restricted during reporting period	Total number of facilities under restrictive sanctions as of June 30, 1977
Air Force	40,101	143	129	151
Army	18,174	108	43	213
Navy	20,073	13	6	12
Marine Corps	1,655	8	0	1
Total	80,003	272	178	377

Sources: Equal Opportunity in Off-Base Housing Reports, July 1 to Dec. 31, 1976, and Jan. 1 to June 30, 1977, table 320. Air Force Housing Referral Reports, July 1 to Dec. 31, 1976, and Jan. 1 to June 30, 1977.

EXHIBIT 6.5

Removal of Restrictive Sanctions

	(1) Restrictive sanctions imposed as of Dec. 31, 1976	(2) New sanctions imposed Jan. 1-June 30, 1977	(3) Sanctions removed Jan. 1-June 30, 1977*	(4) Restrictive sanctions imposed as of June 30, 1977
Air Force	176	31	56	151
Army	230	19	36	213
Navy	15	3	6	12
Marine Corps	1	0	0	1
Total	422	53	98	377

*This figure is the difference between column (4) and the sum of columns (1) and (2).

Source: Equal Opportunity in Off-Base Housing Reports, July 1 to Dec. 31, 1976, and Jan. 1 to June 30, 1977, table 320.

quantitative information about the operation of the off-base fair housing programs. For example, they do not have such information as:

- The percent of service persons who locate in all-minority, all-white, or integrated neighborhoods.

- The number of agents refusing to sign assurances of nondiscrimination.
- The extent to which housing referral offices receive and follow up on information other than complaints that may indicate discrimination.
- The types of complaints received—either the basis of the alleged discrimination or the type of discrimination alleged.
- The average processing time for complaints.
- The extent of any backlogs in complaint processing.
- The reasons for failure to lift any restrictive sanctions that remain in effect after 180 days.
- The frequency and type of coordination with other Federal, State, or local agencies.
- The methods used for allocating resources.

Indeed, DOD and the military services appear to maintain less information at headquarters about the operation of their program than other Federal agencies with major fair housing responsibilities.[158]

B. Internal Monitoring

Onsite monitoring of the fair housing component of the off-base housing program appears to be inadequate and ad hoc. The only written instruction for evaluating the program is a "Checklist for Commanders" provided by DOD headquarters to base commanders to assist them in monitoring the operation of the fair housing program.[159] The checklist is for an informal evaluation. It does not require any information to be collected or any reports to be prepared. Twice a year the individual in charge of fair housing within the Office of the Deputy Assistant Secretary for Equal Opportunity visits a number of bases to review their fair housing program.[160] The bases are usually selected at random.

Army and Marine Corps headquarters staff with fair housing responsibilities also visit bases occasionally for the purpose of reviewing the implementation of the equal opportunity in off-base housing program.[161] The Marine Corps and the Army were unable, however, to provide data on the frequency of the visits.[162] The Army indicated that its visits were once routine but have become ad hoc and infrequent.[163]

The Inspectors General and specialized civil engineering and housing inspection teams of most service headquarters and of the major commands routinely conduct base inspections every 1 to 3 years. These inspections are designed to review many aspects of a base's operation. DOD observes that also:

> The commanders and HRO's are evaluated for compliance with DOD and Service directives. . . .
>
> The ultimate measure of HRO program success comes from the evaluation of information on Service personnel satisfaction with housing and their treatment at the HRO on the installation and in the local community. This information is collected through DOD and Service personnel surveys, IG questionnaires administered during inspections and visits, and personal counseling sessions with IG representatives.[164]

However, almost no information was available on the degree to which the equal opportunity in off-base housing program is monitored.[165]

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[158] See, for example, the chapters in this report on the Department of Housing and Urban Development and the Veterans Administration.

[159] DOD Instruction 1100.16, enclosure 3. The following are the items on that checklist.

1. Are all assigned personnel informed of the Equal Opportunity in Off-Base Housing Program requirements prior to obtaining housing off-base?
2. Is there an effective Equal Opportunity in Off-Base Housing information program?
3. Are community resources being used to support the Equal Opportunity in Off-Base Housing information program?
4. Are housing discrimination complaints being processed within the required time?
5. Are complainants being informed in writing of the results of housing discrimination inquiry/investigation actions?
6. Are housing surveys being conducted periodically to obtain new listings?
7. Are restrictive sanctions being imposed immediately for a minimum of 180 days on agents found to be practicing discrimination?
8. Are the services of command representatives provided to assist applicants in their search for fair housing?
9. Are HRO personnel and Equal Opportunity personnel aware of and sensitive to housing problems encountered by DOD personnel?
10. Are Equal Opportunity in Off-Base Housing reports being submitted accurately and on time?

[160] On occasions, this representative visits an area for other than fair housing reasons, but takes this opportunity to review the equal opportunity in off-base housing program at bases within the same geographical area. Eppinger interview.

[161] Baker and Carter interviews.

[162] Ibid.

[163] Carter interview. No specific information was available as to whether or not similar visits are made by Air Force and Navy headquarter fair housing personnel.

[164] Carpenter letter.

[165] The Marine Corps indicates that information acquired through such inspections is for official use and cannot be released. Marine Corps response. The Air Force indicates that the Air Force Inspector General conducts an inspection every 3 to 4 years and Command Inspectors General, every 2 years. In addition, Civil Engineering Management evaluation teams review HROs every 2 years and interview landlords as well as persons served by the HRO. Berkovsky and Ballif interview. The Navy indicates that HROs are monitored by its Inspector General's Office every 3 years. Navy response. The Marine Corps indicates that biennial inspections by the Inspector General of the Marine Corps and local annual Commanding Generals' inspections review all housing referral functions.

VI. Internal Coordination

1. Headquarters

The equal opportunity in off-base housing program is coordinated among the military services, both at headquarters and at the base level. Service headquarters personnel having fair housing responsibilities communicate with each other and meet periodically to discuss their respective programs.[166] Further, they sponsor housing workshops or conferences, jointly or separately, that are open to all DOD housing personnel.[167] However, coordination between DOD headquarters and service headquarters' visits to installations is apparently lacking.

2. Base Level

At base level, jointly operated or coordinated offices are responsible for ensuring that housing listings and other information are exchanged by the bases or installations within the area.[168] In addition, base commanders are required to inform other bases within the same commuting area of the imposition of restrictive sanctions.[169] For reporting purposes, the joint office or the central coordinator of coordinated offices will consolidate data from the various bases into a single report for the area.[170]

Marine Corps response. At the Army, it is not known whether, in fact, Army and Command Inspector General inspections monitor the equal opportunity in off-base housing program. Carter interview.

[166] Berkovsky and Ballif interview.

[167] Eppinger interview.

[168] DOD Instruction 4165.51, pp. 4, 6.

[169] DOD Instruction 1100.16, enclosure 4, p. 7.

[170] DOD Instruction 4165.51, p. 5.

Chapter 7

GENERAL SERVICES ADMINISTRATION

Summary

The General Services Administration is responsible for acquiring space for Federal facilities through construction, purchase, or lease. As the Federal Government's real estate agent, GSA has a unique opportunity to influence fair housing practices in communities to which Federal agencies relocate. Executive Order No. 12,072, which sets forth Federal space acquisition policies, was issued in August 1978 to replace Executive Order No. 11,512 on the same topic. It states that GSA must, when acquiring space, consider the availability of adequate low- and moderate-income housing on a nondiscriminatory basis for Federal employees. This new order is an improvement over Executive Order No. 11,512 which also required consideration of low- and moderate-income housing, but made no mention of nondiscrimination. However, the new order could be further strengthened if it required consideration of equal housing opportunity for Federal employees of all income levels.

In accordance with Executive Order No. 11,512 and Title VIII of the Civil Rights Act of 1968, GSA and HUD signed a Memorandum of Understanding in 1971 in which GSA agreed to solicit HUD's advice on the availability of housing without discrimination based on race or national origin in communities under consideration for location of a Federal agency. However, the agreement has not been revised since its inception and thus does not reflect the 1974 amendment to Title VIII prohibiting sex discrimination in the financing, sale, and rental of housing.

GSA and HUD have issued procedures which define the responsibilities of the two agencies pursuant to the Memorandum of Understanding. The major effect of the implementing procedures, however, is to greatly restrict the activities to which the agreement will apply.

- The agreement does not apply to an agency relocation to a building currently owned or leased by the Federal Government.
- The agreement applies only if the relocation of 100 or more low- or moderate-income employees is involved, and thus provides no assistance to employees of smaller installations which relocate.
- The agreement does not apply if a major lease action is divided into a number of small ones, a practice frequently followed by agencies about to negotiate a lease.

Although the HUD–GSA Memorandum states that it will be reviewed at the end of 1 year and modified to incorporate provisions necessary to improve its effectiveness, no such review has ever taken place. GSA states that there is no need for review because its regional offices have expressed no general dissatisfaction with the implementation of the agreement. Moreover, GSA has no central recordkeeping procedures at headquarters to monitor the agreement's implementation.

There has been improvement in the past 4 years in GSA's requests to HUD pursuant to the Memorandum of Understanding. However, on occasion, GSA has neglected to ask HUD to identify discrimination in the sale and rental of housing in the vicinity of sites under consideration for Federal facilities.

The HUD–GSA Memorandum of Understanding requires that prior to the announcement of a site selected contrary to the recommendation of HUD, an affirmative action plan must be developed by the Federal agency involved, GSA, HUD, and the community in which the facility will be located. However, no affirmative action plan has ever been put into effect, although there is considerable evidence that such plans have been necessary. In

addition to the fact that HUD has approved sites where housing is inadequate, in at least two cases relocation has proceeded in a location where HUD did not find an adequate supply of low- and moderate-income housing or nondiscrimination in the sale and rental of housing, circumventing the purposes of the Memorandum of Understanding and Title VIII of the Civil Rights Act of 1968.

GSA reports that it annually spends $1.2 million to implement the HUD–GSA Memorandum of Understanding. Nonetheless, this Commission was unable to find any evidence that GSA's activities pursuant to that memorandum have had any impact upon the fair housing practices in communities to which Federal agencies relocate.

I. Background

Communities surrounding Federal agencies receive significant benefit from the Federal presence, especially from large installations.[1] A major new Federal installation brings about dramatic physical, economic, and demographic changes. The Government brings with it jobs. The needs of Federal personnel for such services as housing, schools, stores, and banks create more jobs and investment opportunities. The Federal presence often attracts other industry. As this Commission noted in a 1974 report, such benefits make the Federal presence a significant asset to most communities.[2]

Public officials, politicians, local civic associations, real estate groups, and builders have frequently been in favor of plans to move Federal agencies to their communities.[3] When a facility in their community is likely to be closed or relocated, there is often vigorous opposition. Such opposition was voiced when a large number of military bases was closed in 1973.[4] Similarly, the proposed plans to relocate 2,400 employees of the Nuclear Regulatory Commission from a number of Montgomery County, Maryland, offices to downtown Washington, D.C., were protested by Maryland officials.[5]

One important reason for the interest in Federal agency moves is the effect on the Federal work force. People who cannot or do not wish to relocate with their agency may lose their jobs, and through attrition and the creation of new jobs, there would likely be openings for employment at the new location.

Agency relocations are especially likely to have an adverse effect on minority and female employees, who are disproportionately represented among lower income Federal employees. Lower income employees tend not to relocate with their agencies if the move requires an increase in transportation time or necessitates residential relocation for those who

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[1] In response to the opportunity to review this chapter in draft form, GSA wrote to this Commission:

> We appreciate the opportunity to review and comment on your updated 1974 report entitled, "To Provide. . .For Fair Housing." In response, we have prepared the attached staff paper which discusses our views on the material contained in your report. We encourage your staff to give our response full consideration prior to the issuance of the final report. Paul E. Goulding, Director of Congressional Affairs, General Services Administration, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Sept. 11, 1978 (hereafter cited as Goulding letter).

GSA also stated:

> We have found instances throughout the report in which GSA staff has been quoted out of context and information provided by GSA has been misconstrued. Nonetheless, we find that the draft report indicates that we have been at least partially successful in placing GSA's ability to promote fair housing into proper perspective. We provide below in bullet-type format our comments on the draft report. Attachment to Goulding letter.

This Commission has reviewed GSA's comments carefully and found them helpful in editing sections of the report which may not have been sufficiently clear and in bringing the chapter's account of GSA's efforts up-to-date. In three instances, in which GSA's viewpoint differed from that of this Commission, the chapter was revised to reflect GSA's views as well as those of this Commission.

[2] U.S., Commission on Civil Rights, The *Federal Civil Rights Enforcement Effort—1974*, vol. II, *To Provide. . .For Fair Housing*, p. 271 (hereafter cited as *To Provide. . .For Fair Housing*).

[3] See, for example, testimony by real estate groups, local public school representatives, county supervisors, colleges, and local home builders associations at a public hearing to air views relative to the proposed relocation of the Naval Oceanographic Center in Mississippi. As one representative of the real estate industry testified:

> I bring you some greetings from the real estate profession in Picayune and Pearl River County. From the brokers, from the sales associates, from the builders, contractors, mortgage bankers and other people in the area. We think our town has much to offer your people in available housing and potential housing.

See also "Trident: Lawsuit Challenges the Navy's Billion-Dollar Baby," *Science Magazine*, vol. 185 (Sept. 13, 1974), p. 928. The article notes: "The Decision to open an air base or other defense facility near a particular town has usually been the occasion for celebration down at the chamber of commerce and city hall." See also U.S. Department of the Navy, *Environmental Impact Statement* (June 1975), vol. III, p. 36.

[4] In Boston, Massachusetts, for example, officials are quoted as estimating that for every dollar in payroll lost by military base closures, three other dollars are lost to the community in the form of reduced sales and other business receipts. "Who Gets Hurt When Military Bases Shut Down," *U.S. News and World Report* (June 3, 1974), p. 68. The Governor of Rhode Island was also quoted as saying that the Navy's closure of bases in that State caused "tremendous and traumatic economic impact." The transfer of Federal civil and military personnel eventually cost the State 18,000 jobs and $250 million a year in salaries.

[5] An account of the testimony of Maryland officials was printed in the *Washington Post*, Apr. 8, 1978.

wish to keep their jobs.[6] Moreover, even if the move creates positions at the new location, unless there is low-income housing in the vicinity, minorities and women who are heads of households may be effectively excluded from consideration for the future vacancies.[7]

It is this Commission's view that the Government must not be in a position of denying jobs to minorities or women by locating where they cannot find or afford housing or locating jobs in areas where the housing is available to minorities only on a discriminatory basis. Federal agencies should not be permitted to relocate in communities without low-income housing or in which housing discrimination is prevalent unless the communities agree to a plan to increase the amount of low-income housing, eliminate discrimination, and affirmatively assure equal housing opportunity by all segments of the real estate industry in that community. The Government should require correction of past inequities and vigorous affirmative action to ensure against future discrimination before moving employees to any location which does not offer fair housing.

The Government can exert a positive influence to stimulate fair housing efforts throughout the Nation by locating, when possible, in communities which make an affirmative effort to comply with Title VIII. If a community needs and wants the services that the Federal presence will bring through a proposed relocation, it should be expected to make efforts to comply with Federal demands for fair housing.

GSA has stated that if the Government curtails a Federal agency relocation because a community will make no effort to correct discriminatory housing practices, this could result in a situation "which works at odds" with the elimination of discrimination by denying vital services where they are most needed.[8] The argument GSA raises is similar to one that has been raised with regard to the enforcement of Title VI of the Civil Rights Act of 1964[9]—that terminating funds would hurt the intended beneficiaries of those programs Federal funding was designed to help.[10] Evidence shows, however, that the mere threat of sanctions, when the Government has evidenced willingness to use them, has been sufficient to stimulate corrections of a great many civil rights violations.[11] This Commission anticipates that many communities, when faced with the possibility that a Federal facility will be located within their boundaries, would be willing to make affirmative fair housing efforts if required to do so as a condition for the location of that facility.

If an agency making a move believes that there are essential reasons for locating within a community [12] that will not correct fair housing violations,[13] the burden of demonstrating these reasons should rest with the agency. When the agency's reasons are valid, the Government should take appropriate enforcement action to ensure that the discriminatory practices are corrected before allowing relocation plans to proceed.[14]

II. Program and Civil Rights Responsibilities

GSA is responsible for acquiring and assigning space for many Federal facilities.[15] It provides space

[6] See, for example, responses in "GSA Agency Questionnaire," Nov. 17, 1977. The questionnaire responses indicate that Government officials anticipated that the relocation of a Federal facility to Laguna Niguel, California, would result in a smaller percentage of moves for employees in grades 1–5 than those of any other grade level. Of the GS 1–5 employees, only 24 percent were expected to make the move. In contrast, nearly all the GS–13s and above (95 percent) were expected to make the move. As of May 31, 1977, 61 percent of all minority Federal employees were employed at the GS–6 level and below; 68 percent of all female employees were employed at the GS–6 level and below. U.S. Civil Service Commission, Bureau of Manpower Information Systems, Central Personnel Data File, 1977.

[7] For example, when the Internal Revenue Service (IRS) opened a facility in Brookhaven, New York (an area with almost no low-income housing), it had vacancies for a large number of positions for people to process tax returns, a job which required little advance training. It was IRS' intention to fill the positions with "housewives" from the middle class areas near the facility. Low-income persons were virtually excluded from employment at the facility because of the absence of housing they could afford.

[8] Jay Solomon, Administrator of General Services Administration, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Jan. 24, 1978 (hereafter cited as Solomon letter). The full text of this letter, which discusses GSA's accomplishments in detail, is included in its entirety as section VI in this chapter.

[9] 42 U.S.C. § 2000d.

[10] See Brief for the United States as *Amicus Curiae* at 88, Player v. State of Alabama Department of Pensions and Security, Cir. No. 3835-N (M.D. Ala., filed Nov. 17, 1972).

[11] This issue is discussed in U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. VI, *To Extend Federal Financial Assistance* (1975). pp. 384–85.

[12] For example, some agencies' missions are tied to certain areas, such as the Tennessee Valley Authority or the Appalachian Regional Commission.

[13] We recognize that the Federal presence is not universally desired, especially if it will entail new low-income residents in an affluent suburban community. For example, in 1976, citizens and public officials opposed the proposed move of the Defense Mapping Agency to Montgomery County, Maryland. *Washington Post*, Nov. 18, 1977, p. B1, and Apr. 12, 1978, p. C6. Similarly, in suburban Orange County, California, the proposed influx of low-income Federal personnel met resistance. Residents and county officials were not willing to accept low-income workers and subsidized housing. Rudy DeLeon, Research Assistant to Representative Charles H. Wilson, telephone interview, Jan. 23, 1978. The proposed move of Federal employees to Orange County is discussed below.

[14] HUD, for example could determine if sanctions should be taken under the community development block grant program or if the matter should be referred to the Department of Justice for civil action.

[15] 40 U.S.C. § 490(e) (1970).

for Federal agency use through the construction and modification of Federal buildings.[16] If sufficient federally-owned space is unavailable, GSA may purchase or lease privately-owned space.

Title VIII of the Civil Rights Act of 1968 requires all Federal agencies, including GSA, to administer their programs and activities affirmatively to further fair housing.[17] When agencies whose space is handled by the General Services Administration are planning a relocation, this Commission believes that GSA is in a position to exert considerable influence on the extent to which the Government uses its site selection activity to further fair housing.[18]

A. Executive Order 12,072

Executive Order 12,072, signed on August 16, 1978, sets forth the Federal policies which the GSA Administrator should follow in providing space for Federal agencies.[19] The Executive order replaces Executive Order No. 11,512[20] and focuses special attention on the effect of Federal facilities on urban areas. It states:

> 1-101. Federal facilities and Federal use of space in urban areas shall serve to strengthen the Nation's cities and to make them attractive places to live and work. Such Federal space shall conserve existing urban resources and encourage the development and redevelopment of cities.
>
> 1-102. Procedures for meeting space needs in urban areas shall give serious consideration to the impact a site selection will have on improving the social, economic, environmental, and cultural conditions of the communities in the urban area.
>
> 1-103. Except where such selection is otherwise prohibited, the process for meeting Federal space needs in urban areas shall give first consideration to a centralized community business area and adjacent areas of similar character, including other specific areas which may be recommended by local officials.[21]

Among the factors which GSA must consider in locating Federal facilities are:

- Availability of adequate low- and moderate-income housing for Federal employees and their families on a nondiscriminatory basis.[22]
- Impact on economic development and employment opportunities in the urban area, including the utilization of human, natural, cultural, and community resources.[23]
- Availability of adequate public transportation and parking and accessibility to the public.[24]

GSA is required to "consult with appropriate Federal, State, regional, and local government officials" concerning their recommendations for proposed locations. Other factors which must be considered include efficient performance of executive agencies, existence of federally-controlled facilities, prevailing rental rates, need for consolidating agencies in a common or adjacent space, and compatibility with State, regional, or local objectives.[25]

Executive Order No. 12,072 is an improvement over Executive Order No. 11,512 in two major ways. First, although Executive Order No. 11,512 required Federal agencies to consider the availability of low- and moderate-income housing, unlike the new Executive order it made no mention of assuring that such housing is nondiscriminatory. Second, there was some question as to whether Executive Order 11,512 set policy for all Federal agencies, and the revised Executive Order No. 12,072 clarifies this point by stating:

> Executive agencies which acquire or utilize Federally owned or leased space under authority other than the Federal Property and Administrative Services Act of 1949, as amended, shall

[16] GSA operates about 226 million square feet of space in approximately 10,000 federally-owned and leased buildings. U.S. General Services Administration, *1977 Annual Report*, pp. 7-44. Most Federal agencies lack the authority to acquire space themselves and must obtain it through GSA. Certain agencies, such as the Department of the Treasury and the Postal Service, have authority to acquire their own space but may request that GSA acquire land for buildings and contract and supervise their construction, development, and equipment. See 1950 Reorganization Plan No. 18, 15 Fed. Reg. 3,177, 64 Stat. 1270, 40 U.S.C. § 490 note (1970). GSA has also delegated to the Departments of Agriculture, Commerce, and Defense the authority to lease their own space outside urban centers. 41 C.F.R. § 101-18.104(a) (1976).

[17] 42 U.S.C. § 3608(d).

[18] It appears that since 1974, there have been fewer relocations of major Federal agency installations than in the late 1960s and early 1970s. GSA data on recent agency relocations are presented in the section of this report entitled, "Execution of the Agreement and Implementing Procedures." Nevertheless, as discussed below, major agency relocations continue to be made.

GSA and this Commission do not agree on the extent of GSA's capacity to exert a positive socioeconomic influence on the communities in which GSA locates Federal facilities when a major move is made. GSA has set forth its views in a letter of Jan. 24, 1978, which is printed in its entirety in the concluding section of this chapter, entitled "GSA's Fair Housing Role." This Commission's response to those views is also given in that section.

[19] Exec. Order No. 12,072, 14 Presidential Documents 1430-1432 (Aug. 21, 1978).

[20] Exec. Order No. 11,512, 3 C.F.R. 898 (1966-1970 Compilation).

[21] Exec. Order No. 12,072.

[22] *Id.* at § 1-104(d).

[23] *Id.* at § 1-104(c).

[24] *Id.* at § 1-104(e).

[25] *Id.* at §§ 1-104, 1-05, 1-201, and 1-203.

> conform to the provisions of this Order to the extent they have the authority to do so.[26]

This clarification is important because, as of 1977, GSA was responsible for space for only about one-third of all Federal employees.[27]

Nonetheless, Executive Order No. 11,512 could be further strengthened to reflect the Nation's fair housing goals: a provision could be added requiring GSA to consider the extent to which all housing, not merely low- and moderate-income housing, is available on a nondiscriminatory basis in the vicinity of the proposed location of the Federal agency. Such a provision is essential because the Federal commitment to practice equal employment opportunity[28] necessitates that minorities and women of all income levels be permitted access to Federal jobs. The location of Federal jobs where fair housing opportunity is not a reality can adversely affect the employment opportunities of many minorities and women who head households.

B. The HUD–GSA Memorandum of Understanding

In 1971 HUD and GSA signed a Memorandum of Understanding[29] which elaborates on the requirement of Executive Order No. 11,512 and recognizes the affirmative responsibilities of both agencies under Title VIII of the Civil Rights Act of 1968 to administer their programs relating to housing and urban development to further fair housing.[30] The memorandum makes clear that important factors to be considered in the relocation of Federal agencies are the adequacy of the supply of low- and moderate-income housing and the availability of housing without discrimination on the basis of race, color, religion, and national origin.

The purpose of the memorandum is to define the roles of GSA and HUD in considering those factors. Specifically, HUD agrees that upon GSA's request, it will investigate, determine, and report to GSA on the availability of low- and moderate-income housing and the availability of housing on a nondiscriminatory basis. GSA agrees to adhere to HUD's advice, but retains the authority to make final decisions concerning the location of Federal agencies. HUD also agrees to advise GSA on the affirmative steps it should take if adequate housing is unavailable in the vicinity of a site that has been selected. Both agencies agree to develop an affirmative action plan to ensure an adequate supply of low- and moderate-income housing if a site is selected in which the supply is inadequate.

The agreement between the two agencies has not been revised since it was issued in 1971, and thus, as of March 1978, it did not reflect the full scope of Title VIII of the Civil Rights Act of 1968. Title VIII was amended in 1974 to prohibit sex discrimination in the financing, sale, and rental of housing.[31] Sex discrimination continues to be a serious obstacle for women in securing housing.[32] It is incumbent upon GSA and the agencies which are relocating to assure that sex discrimination is not a factor that contributes to women's decisions not to relocate with their agencies. GSA has informed this Commission:

> Inasmuch as Title VIII of the Civil Rights Act of 1968 was amended to prohibit sex discrimination, we believe that HUD analysis should automatically include appropriate evaluations in [its] reports. We will include the Agreement's coverage to sex in any future revision.[33]

In 1975 HUD drafted for discussion proposed changes to the agreement. These proposed changes included extending the agreement to cover "sex." Among the other additions to the agreement which HUD suggested were:

- GSA will communicate with local officials in order to give them early notice of its plans so that an involved community may make provision for needed housing.

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[26] *Id.* at § 1-302.

[27] According to the *Appendix to the Budget of the United States Government Fiscal Year 1978*, GSA was responsible for space housing 844,700 of the approximately 2.4 million Federal employees. Authority for space acquisition by Federal agencies other than GSA is discussed above.

[28] Exec. Order No. 11,478, 3 C.F.R. 133 (1969) and the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e(16) (1970)) prohibit the Federal Government from discriminating on the grounds of race, color, religion, national origin, or sex in employment practices.

[29] Memorandum of Understanding Between the Department of Housing and Urban Development and the General Services Administration Concerning Low- and Moderate-Income Housing, signed by Robert L. Kunzig, Administrator, GSA, June 11, 1971, and George Romney, Secretary, HUD, June 12, 1971 (hereafter cited as HUD–GSA Memorandum of Understanding).

[30] 42 U.S.C. § 3608(c)–(d) (1970).

[31] 42 U.S.C. §§ 3604–3605 (Supp. V 1975).

[32] Among the common forms of discrimination against women are refusal to rent to women; refusal to rent to separated or divorced women; refusal to rent to female roommates who are single; failure to count all of a woman's earnings, including part-time earnings, in evaluating her ability to repay a loan; and conditioning mortgage loans on a woman's childbearing or childrearing intentions. Women who wish to buy homes often face negative attitudes of real estate brokers who assume that they will be unable to obtain financing. For further discussion see U.S. Department of Housing and Urban Development, *Women and Housing, A Report on Sex Discrimination In Five American Cities* (June 1975) and U.S. Commission on Civil Rights, *Mortgage Money: Who Gets It?* (June 1974).

[33] Attachment to Goulding letter.

- GSA shall accept methodology and procedures used by HUD in the conduct of the market survey and analysis and shall regard the findings of HUD as expert findings.
- If an affirmative action plan providing for the needed housing units cannot be developed within the specified time which is acceptable to both HUD and GSA, then the decision to utilize the site will be reversed by GSA.[34]

GSA was willing to meet with HUD to discuss proposed changes.[35] However, the discussions were stalled because of disagreements over the need for low- and moderate-income housing in Baltimore County in the vicinity of a proposed Social Security Administration building.[36] Indeed, GSA has indicated that until August 1978 it had not seen the specific changes which HUD proposed.[37] As of that time, the two agencies had not agreed upon any proposed changes.

C. Implementing Procedures

GSA and HUD have issued procedures which define the responsibilities of the two agencies pursuant to the Memorandum of Understanding.[38] They provide for such matters as information which GSA must give to HUD about each space action, specifications for HUD's reports to GSA, and requirements for affirmative action plans when HUD finds an inadequate supply of low- and moderate-income housing or observes discriminatory housing conditions in the vicinity of the proposed facility.

The major effect of the implementing procedures, however, is to restrict greatly the activities to which the agreement will apply. Specifically, the procedures limit the applicability of the agreement to project development investigations,[39] site investigations, [40] and major lease actions.[41]

Major lease actions are those where: (1) 100 or more low- and moderate-income employees are expected to be employed in the space to be leased, and (2) the lease involves residential relocation of a majority of the low- and moderate-income work force, or a significant increase in transportation, parking costs, or travel time to the new location in excess of 45 minutes.[42] The agreement may also be applied to any other action of special importance.[43] The present trend is to provide space by lease.[44]

The agreement does not apply to the relocation of a Federal agency to a building currently owned or leased by the Federal Government or to a large number of agency moves in which employees will retain their former housing. This limitation in the agreement is seemingly practical because it obviates a review of situations in which most Federal employees are not seeking new housing. The outcome, however, is to curtail greatly the impact of the Memorandum of Understanding. The result is that the memorandum is rarely applicable to GSA's space acquisition activities.

The limitations which HUD and GSA have placed on the memorandum through their implementing procedures have a number of undesirable effects. First, the limitations disregard the possibility that employees are currently forced to live in segregated housing or housing beyond their budget. To obtain the greatest leverage, the agreement should be used to require the development and execution of affirmative action plans to correct housing deficiencies in communities in which Federal facilities are currently located.[45]

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[34] The changes to the memorandum were made in a paper entitled "Draft For Discussion: Proposed Changes in HUD–GSA Memorandum of Understanding"(undated).

[35] Arthur I. Sampson, Administrator of General Services, letter to Carla A. Hills, Secretary, Department of Housing and Urban Development, July 23, 1975.

[36] This situation is discussed below.

[37] Attachment to Goulding letter.

[38] 41 C.F.R. § 101–17 (1976), Construction and Alteration of Public Buildings; General Services Administration Order PBS 7,000.11, "Availability of Low- and Moderate-Income Housing–DHUD/GSA Memorandum of Understanding of June 12, 1971," 37 Fed. Reg. 11,371 (June 7, 1972); and Department of Housing and Urban Development, "New and Relocating Federal Facilities Procedures for Assuring Availability of Housing on Nondiscriminatory Basis for Low- and Moderate-Income Employees," 37 Fed. Reg. 11,367 (June 7, 1972).

[39] A project development investigation is a field study resulting in a comprehensive planning document containing the data and information needed to justify Federal or lease construction, purchase of a building, or a major alteration project for housing Federal activities.

[40] A site investigation is a field study to consider all potential locations for a new project within a delineated area of a particular community and to present, as an end product, three sites ranked in order of desirability for the proposed project.

[41] A lease action is a lease of space by GSA for which there is no existing lease (new lease), a lease by which occupancy is continued after expiration of an earlier lease (succeeding lease), or a lease that cancels or replaces an existing lease prior to its expiration (superseding lease).

[42] Major lease actions also include those that will result in a 20 percent increase in travel time if it already exceeds 45 minutes.

[43] GSA retains authority by the regulations to determine what lease actions might be of "special importance."

[44] Solomon letter.

[45] GSA wrote to this Commission:

> The [Commission] suggests by inference that the HUD/GSA Agreement should include agency "moves in which employees will retain their former housing." Such a concept is developed out of a misunderstanding of GSA's mission. The role of monitoring local housing practices is logically and practically placed with HUD. The result of GSA applying such a concept would be to duplicate or usurp the responsibilities of HUD. Attachment to Goulding letter.

For the Federal Government to use proposed new facilities as leverage to

Second, the requirement that the relocation must involve 100 or more low- or moderate-income employees can cause hardship to employees of smaller installations.[46] There is no parallel limitation in Title VIII of the Civil Rights Act of 1968 upon which the memorandum is based. Although the Equal Employment Opportunity Commission encourages private employers to consider the potentially discriminatory effect of any relocation to an area with inadequate housing opportunities for minorities or women, EEOC's guidance is not limited to employers who have only 100 or more low- or moderate-income employees on their payrolls.[47] The Federal Government should not hold itself to a lesser standard than that which it applies to the private sector. This requirement that the agreement will be implemented only if relocation of 100 or more low- or moderate-income employees is involved also means that the agreement need not be followed if a major lease action is divided into a number of smaller ones. Indeed, the General Accounting Office found that, for reasons unrelated to the HUD–GSA agreement, instead of entering into a major lease, Federal agencies have sometimes divided their request for space into small blocks.[48]

III. Execution of the Agreement and Implementing Procedures

A. GSA Evaluation and Recordkeeping

The GSA–HUD agreement[49] states that the memorandum will be reviewed at the end of 1 year and modified to incorporate any provisions necessary to improve the effectiveness of the agreement. As of February 1978, no such review had taken place,[50] although it should have been conducted in 1972, and in 1975 HUD had strongly advocated that such a review take place.[51] GSA reports that there has been no need for such a review, because all of its regional officies are complying with the agreement and have expressed no general dissatisfaction with its implementation.[52]

There have been no followup studies of agency relocations to determine if:

- Any employees who wished to relocate with their agencies were unable to do so because of: a) absence of housing in a price range they could afford, b) discriminatory housing conditions in the new location.
- The composition of the work force at the new location reflected underutilization of minorities and women because of discriminatory housing conditions or insufficient low- and moderate-income housing in the new location.

The Memorandum of Understanding has apparently never resulted in a change in an agency's plan for relocation.[53] It has never been used as a tool to stimulate improved housing opportunities for Federal employees and prospective employees.[54] Nonetheless, GSA officials have conducted no evaluation to determine why the memorandum has had so little effect or if, in the light of its ineffectiveness, some other means should be devised for assuring that minority and female rights will be protected in the process of agency relocation.

The records that GSA maintains in its central office are inadequate for studying the implementation of the HUD–GSA Memorandum of Understanding. For example, GSA does not maintain information on the number of site investigations, project development investigations, and lease ac-

obtain corrections of fair housing deficiencies, GSA as well as HUD must assume fair housing duties. In particular, GSA should alert HUD to possible agency relocations so that HUD can determine the availability of low- and moderate-income housing and availability of housing on a nondiscriminatory basis with regard to proposed sites. Where HUD finds absence of fair housing near a site which GSA subsequently approves, GSA must work with HUD and the community toward the adoption of an affirmative action plan to remedy the deficiencies.

[46] Examples of such hardships are provided in *To Provide. . .For Fair Housing*, p. 288. GSA stated:

> Within the limitations of our expertise in the areas of residential real estate, we will continue to review HUD reports. Although we are unable to force agencies to utilize fair housing data gathered by HUD, we will make such information available. Attachment to Goulding letter.

[47] U.S., Equal Employment Opportunity Commission, *Affirmative Action and Equal Opportunity: A Guidebook for Employers*, vol. 1 (January 1974), p. 62.

[48] U.S., General Accounting Office, *General Services Administration's Practices in Awarding and Administering Leases Could Be Improved* (1978), pp. 3–9

[49] HUD–GSA Memorandum of Understanding.

[50] Loy M. Shipp, Jr., Assistant Commissioner, Office Space Planning and Management; John P. Spock, Supervisor, Leasing Divisions; Otis Brunson, Supervisor, Planning Division; and James Herbert, Special Assistant, Administrative Staff, GSA, interview, Nov. 11, 1977 (hereafter cited as Shipp and others interview).

[51] Carla A. Hills, Secretary, HUD, letter to Arthur F. Sampson, Administrator, GSA, Aug. 5, 1975. In her letter, Ms. Hills noted that the Memorandum of Understanding is to be reviewed at the end of 1 year to incorporate any provision necessary to improve its effectiveness in light of actual experience. She also reminded GSA that this had not been done since this memorandum went into effect.

[52] Shipp and others interview.

[53] GSA officials were unable to provide any examples in which the Memorandum of Understanding affected an agency's choice of location. Loy Shipp, Jr., Assistant Commissioner, Office of Space Planning and Management, and James Herbert, Realty Specialist, Public Buildings Service, GSA, interview, May 1, 1978 (hereafter cited as Shipp and Herbert interview).

[54] As discussed below, no affirmative action plans have ever been finalized to remedy inadequate supplies of low- or moderate-income housing or discrimination in the sale or rental of housing.

tions to which the Memorandum of Understanding should have been applied. The central office does not routinely maintain records on the locations for which it has requested HUD's assistance under the memorandum or even the number of times HUD's assistance was requested.[55]

In response to an inquiry by this Commission,[56] GSA's central office determined that during fiscal years 1975, 1976, and 1977, GSA requested HUD's advice 31 times.[57] GSA stated, "These statistics were hurriedly gathered by telephone survey and cannot be exactly verified until a more comprehensive survey has been concluded."[58] These data did not always agree with information obtained by Commission staff from HUD or GSA regional offices.[59] It would appear that GSA had probably requested HUD's advice fewer than 31 times in three fiscal years, a considerable decrease in frequency from fiscal years 1971 and 1972 when GSA requested HUD's advice 120 times.[60]

B. Information sent from GSA to HUD

Under the implementing procedures of the HUD–GSA Memorandum of Understanding, GSA is directed to inform HUD promptly of the pending action and supply the following information:

- the number of low- and moderate-income jobs anticipated at new or relocated facilities when fully staffed.
- the delineated area within which the specific site will be considered or the lease action is anticipated.
- copies of the prospectus and site directives for the project.

A review of GSA correspondence[61] with HUD indicates that GSA now regularly provides this information when requesting HUD advice.[62]

C. GSA Requests for Information

In 1974 this Commission observed that GSA's requests for information from HUD were often deficient, because they were general requests for "socio-economic information" and failed to ask for a determination of the extent of discrimination in the sale and rental of housing.[63] Since that time, GSA has improved upon its requests for information from HUD. For example, in April 1975, GSA wrote to HUD requesting the following information on a Federal space site in Vicksburg, Mississippi, in accordance with the HUD–GSA Memorandum of Understanding:

1. Summary information on general type, location, cost and vacancy rates for all housing in the survey area.
2. A listing, in cartographic and tabular form, of all HUD subsidized housing in the survey area. The racial occupancy of such housing and its vacancy rate should be included.
3. An estimate, by location, of all other low and moderate-income housing in the survey area which would meet the standards for relocation housing contained in the HUD Relocation Handbook (1371.1), Chap. 3 and 4. The rental occupancy of such housing or the neighborhood in which it is located, should be included, as well as vacancy rates.
4. A listing by location, of all subsidized housing planned within the survey area for the one-year period following the survey.

[55] Edward W. Geiser, Chief, Operational Planning, PBS, Chicago, Ill., GSA, and Hilary Richards, Chief, Space Management Division, PBS, Washington, D.C., GSA, telephone interviews, Jan 3, 1978.

[56] Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, letter to Jay Solomon, Administrator, General Services Administration, Oct. 26, 1977.

[57] These data were provided by year and region as follows: Region I (Boston Mass.), 1976—2, 1977—1; Region 2 (New York, N.Y.), 1975—2; Region 3 (Washington D.C.), 1975—1; Region 4(Atlanta, Ga.), 1975—5, 1976—1, 1977—4; Region 5 (Chicago, Ill.), 1975—2, 1977—2; Region 6 (Kansas City, Mo.), 1975—2, 1976—2; Region 9 (San Francisco, Calif.), 1975—4, 1976—2; and Region 10 (Auburn, Wash.), 1975—1. GSA, "Record of Incidence of GSA Request for HUD Advice Under the GSA/HUD Agreement," factsheet supplied by James Herbert, Realty Specialist, Office of Space Planning and Management, PBS, GSA, Nov. 17, 1977.

[58] Ibid.

[59] For example, in Regions 1 and 2 HUD said there were no requests during the period 1974–77, and GSA said there were three requests for Region 1 and two requests for Region 2. In Region 4 HUD indicated that its assistance was requested only once and GSA said there were 10 requests during that period. Not only were there differences between HUD and GSA but also between GSA regional and central offices. For example, in Region 9 HUD indicated that GSA requested HUD's assistance three times; the GSA Region 9 Office indicated three times, and the GSA central office indicated six times. Interviews with HUD and GSA Regional Offices and "Record of Incidence of GSA Requests for HUD Advice Under the GSA/HUD Agreement," submitted by Jim Herbert, Realty Specialist, Office of Space Planning and Management, PBS, Dec. 21, 1977.

[60] GSA's efforts in 1971 and 1972 are discussed in *To Provide. . .For Fair Housing*, pp. 289–290. The majority of projects authorized in 1972 have been completed.

[61] Commission staff reviewed GSA correspondence with HUD in connection with the following locations: Birmingham, Ala.; Phoenix, Ariz.; San Francisco and San Jose, Calif.; Washington, D.C.; Chicago and Springfield, Ill.; Annapolis, Montgomery County, and Baltimore County, Md.; Springfield and Boston, Mass.; Philadelphia and Mechanicsburg, Pa.; Providence, R.I.; Charlottesville and Norfolk, Va.; and Martinsburg and Huntington, W.Va.

[62] In 1974 this Commission observed that, although GSA generally provided HUD information about the location of the proposed site of the Federal facility, it had not been as consistent in supplying HUD with the required employee information. *To Provide. . .For Fair Housing*, pp. 290–91.

[63] *To Provide. . .For Fair Housing*, pp. 296–300.

5. A listing of competing displacement needs for the subsidized housing planned in 4.
6. A delineation of the geographic boundaries of all urban renewal, neighborhood development project, code enforcement, and model cities areas.
7. A delineation, in map form, of those subareas within the survey area which appear accessible to a supply of low and moderate-income housing on a nondiscriminatory basis, and those which do not so appear.
8. A determination of the extent of discrimination in the sale and rental of housing.[64]

In some cases GSA failed to mention the need for information on the extent of discrimination in the sale or rental of housing, unnecessarily limiting its request to information about low- and moderate-income housing. Such an omission occurred as recently as July 1977 with regard to an Internal Revenue Service Center in Chamblee, Georgia. In that case, GSA merely requested HUD to "determine the adequacy and availability of low to-moderate-income housing within this general survey area."[65]

D. HUD Reports to GSA

In 1974 this Commission recommended that GSA and HUD procedures implementing the Memorandum of Understanding be revised to state how nondiscrimination should be measured.[66] Specifically, the Commission urged that HUD's investigation include a compliance review of fair housing in the community in question, with the following components:

- Testing[67] of new and existing rental and sale housing at all income levels by appropriately trained personnel. Since HUD suffers from a shortage of equal opportunity staff, it may be necessary to contract this responsibility to local fair housing groups and organizations with experience in testing. The funds for these contracts could be furnished either by HUD or GSA.
- A comprehensive compliance review of the operation of all HUD programs in the proposed site selection area to determine if the locality is complying with HUD equal opportunity requirements. This should include a review of the implementation of all major affirmative marketing plans in the areas.[68]
- Consultation with local community groups actively engaged in bringing about fair housing in the proposed site area.
- A public hearing held by HUD at which the residents of the metropolitan area or region may testify as to their experience in obtaining housing on a nondiscriminatory basis in the proposed site area.[69]

GSA and HUD procedures implementing the Memorandum of Understanding have not been revised since they were issued in 1972, and they continue to omit adequate specifications for HUD reports. HUD notes, however, that, "HUD recommended changes to GSA several years ago, but was unable to reach an agreement."[70]

Some HUD reports reviewed by Commission staff, such as those concerning proposed Federal sites in Vicksburg, Mississippi, and in Birmingham, provided information on the subareas which were accessible to low- and moderate-income housing on a nondiscriminatory basis and those which were not. They also mentioned the extent of discrimination in the site and rental of housing.[71]

However, in a number of instances HUD's reports were deficient. In one 1977 case, HUD responded to a GSA request by saying only that it had reviewed

[64] J.E. Smith, Regional Commissioner, PBS, GSA, Atlanta, Ga., letter to E. Lamar Seals, Regional Administrator, HUD, Atlanta, Ga., Apr. 16, 1975; J.E. Smith, letter to E. Lamar Seals, Feb. 4, 1976.

[65] J.E. Smith, letter to M. Bruce Nestlehutt, Acting Regional Administrator, HUD, Atlanta, Ga., July 18, 1977. Similarly, with regard to a potential lease agreement with the University of Virginia for the expansion of a Federal training center, GSA merely wrote to HUD, "[W]e request your advice concerning the availability of low and moderate income housing on a nondiscriminatory basis." GSA did not request information concerning the extent of discrimination in the sale and rental of housing in all price ranges. John F. Galuardi, Acting Regional Administrator, GSA, Philadelphia, Pa., letter to Theodore R. Robb, Regional Administrator, Department of Housing and Urban Development, Philadelphia, Pa., Mar. 25, 1975.

[66] *To Provide. . .For Fair Housing*, p. 359.

[67] Testing, a method of determining whether discriminatory practices exist in the sale or rental of housing by comparing experiences of minority and nonminority "homeseekers," is discussed in the chapters in this report on the Departments of Justice and Housing and Urban Development.

[68] See the chapter in this report on the Department of Housing and Urban Development for a discussion of HUD's affirmative marketing requirements. If HUD had an ongoing program of compliance reviews, it could draw on recent reviews in order to provide the necessary information to GSA.

[69] HUD has issued regulations for holding administrative meetings, i.e., public meetings to identify and publicize discriminatory housing practices within a locality and to "promote and assure" equal housing opportunity. 24 C.F.R. § 106 (1977).

[70] Henry A. Hubschman, Executive Assistant to the Secretary of Housing and Urban Development, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights (hereafter referred to as Hubschman letter).

[71] J.E. Smith, Regional Commissioner, PBS, GSA, Atlanta, Ga., letter to E. Lamar Seals, Regional Administrator, HUD, Atlanta, Ga., Apr. 16, 1976. E. Lamar Seals, Regional Administrator, HUD, Atlanta, Ga., letter and attachment to J.E. Smith, Regional Commissioner, PBS, GSA, Atlanta, Ga., May 20, 1975. See also J.E. Smith, letter and attachment to E. Lamar Seals, Feb. 3, 1976.

the materials provided by GSA and had "determined that the adequacy and availability of low- to moderate-income housing within the general survey area is good. Our review indicates that employees involved in such a proposed action would be able to secure suitable housing."[73] In another 1977 case, HUD approved the location GSA proposed based on "survey materials submitted to [HUD] from a previous [1975] request and the knowledge that there have been no identifiable changes in the delineated area."[73] HUD did not conduct a new review of the delineated area. In a 1975 case, HUD concluded that there appeared to be an adequate supply of low-rent housing. HUD based its conclusion primarily on the large number of vacancies in public housing operated by the local housing commission, but it neglected to mention that much of the housing operated by that commission was segregated.[74]

In at least two cases, HUD has found evidence of discrimination and an inadequate supply of low- and moderate-income housing, but has approved GSA's plans for relocation. To illustrate, with regard to Fort Lauderdale, HUD's report stated:

> First, the vacancy rate for subsidized housing in the area is less than one (1) percent. In our view, if a Federal agency were moving to Fort Lauderdale from another city, there would be a question of an adequate supply of housing for low- and moderate-income employees. Secondly, we have found that the extent of racial discrimination in the sale and rental of housing is apparently quite pervasive.[75]

Nevertheless, HUD approved the sites based on its belief that "the local governments in the area have moved ahead to mitigate this problem."[76]

Similarly, in Mechanicsburg, Pennsylvania, HUD found an inadequate supply of low- and moderate-income housing in the town. It also stated that the lack of minorities in Mechanicsburg, even though a significant number of minority individuals were employed there, was the "major index of the extent of housing discrimination." The HUD review found that:

- There were 1,951 owner occupied and 1,160 renter occupied units in Mechanicsburg, with vacancy rates of 0.4 percent and 1.4 percent respectively. . . .The vacancy rates are so low that relocation, without adding new units to the low and moderate income housing supply, would be infeasible.
- As to accessibility on a nondiscriminatory basis, there are a number of indications to the contrary.

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[73] M. Bruce Nestlehutt, Acting Regional Administrator, HUD, Atlanta, Ga., letter to J.E. Smith, Regional Commissioner, PBS, GSA, Atlanta, Ga., Aug. 5, 1977. See also Joe E. Tucker, Evaluation and Support Division, HUD, Atlanta, Ga., memorandum to David Bibb, GSA, Atlanta, Ga., Aug. 8, 1977. HUD wrote to this Commission:

> . . .the facility involved was an I.R.S. service center which was to be relocated from one location to another within the suburban Atlanta community of Chamblee, Georgia. . . .Since the proposed relocation would not have required any employees to change their residences, there was no need to conduct extensive reviews of the availability of housing. Hubschman letter.

As discussed above, if a lease action does not involve the residential relocation of the majority of a low- or moderate-income work force which equals or exceeds 100 employees, the HUD–GSA agreement does not apply. However, in the correspondence through Aug. 5, 1977, between HUD and GSA concerning the Internal Revenue Service center, neither agency asserted that the agreement was not applicable. Indeed, GSA had specifically written to HUD, "In compliance with the GSA–HUD Memorandum of Understanding, we ask that you determine the adequacy and availability of low-to-moderate income housing within the general survey area." J.E. Smith, Regional Commissioner, Public Buildings Service, GSA, letter to M. Bruce Nestlehutt, Acting Regional Administrator, HUD, July 18, 1977.

[73] M. Bruce Nestlehutt, letter to J.E. Smith, Mar. 16, 1977. HUD wrote to this Commission:

> The GSA request to the HUD Regional Office in Atlanta indicated that it planned to lease new office space in Atlanta, and that the employees who would be relocated currently worked at another Atlanta location. GSA stated that no residential relocation would take place as a result of this intra-city move. Again, there was no need to conduct new, in-depth studies of Atlanta since no housing changes were involved. Hubschman letter.

However, the correspondence between HUD and GSA indicated that both agencies were attempting to apply the HUD–GSA Memorandum of Understanding. GSA requested information pursuant to that memorandum. J.E. Smith, letter to M. Bruce Nestlehutt, Mar. 9, 1977. HUD asserted that it was responding to GSA's request. M. Bruce Nestlehutt, letter to J.E. Smith, Mar. 16, 1977.

[74] Analysis by U.S. Commission on Civil Rights staff of statistics included in the HUD report showed that, although 11 percent of the occupants of approximately 10,000 units in public housing managed by the local housing commission were white, 80 percent of whites were concentrated in 5 projects. About half of the 25 projects it managed were 99 to 100 percent black occupied. Elmer C. Binford, Detroit Area Office, memorandum to George J. Vavoulis, Regional Administrator, HUD, Chicago, Ill., Apr. 3, 1975. HUD wrote to this Commission:

> The matter referred to in the text was the proposed construction of a correctional facility in the Ambassador Bridge Area, connecting the cities of Windsor and Detroit. The report states that HUD had not mentioned that much of the housing in the area was segregated. The report supports this statement by noting that public housing projects in the area were segregated. . . .
>
> However, it should be pointed out that the report's analysis looks only at a few public housing projects. Federal employees generally do not live in public housing. The HUD report, and certain subsequent correspondence not mentioned by the Commission draft report, gave a general picture of the availability of private and public housing. The Commission draft report focusses on a narrow portion of the HUD report that does not reveal the true housing situtation that newly located federal employees would face. Hubschman letter.

This Commission's analysis covered about 10,000 housing units managed by the local public housing commission. The HUD report did identify about 4,000 additional units, but these units were not included in this Commission's analysis because HUD's report to GSA failed to provide information on the number or distribution of minority tenants in those units.

[75] E. Lamar Seals, Regional Administrator, HUD, Atlanta, Ga., letter to J.E. Smith, Regional Commissioner, PBS, GSA, Atlanta, Ga., Dec. 17, 1974.

[76] Ibid.

The minority population of Mechanicsburg is only 45 persons, of which 14 are black.[77]

HUD approved GSA's site selection; no affirmative action plan was developed;[78] and GSA allowed the Department of the Navy to relocate 145 employees from Great Lakes, Illinois, to the Naval facility in Mechanicsburg.

IV. Affirmative Action Plans

If GSA selects a location which HUD reported as inadequate, GSA must only provide a written explanation to HUD of its reasons for selection. There is no requirement that this explanation be made public, for example, by printing it in the *Federal Register.* The implementing procedures do not require GSA to give preference to locations in which open housing for all racial and ethnic groups prevails and in which the supply of low- and moderate-income housing is at least adequate to meet the community needs.[79]

The HUD–GSA Memorandum of Understanding requires that, prior to the announcement of a site contrary to the recommendation of HUD, an affirmative action plan must be developed. The plan is to be developed by the Federal agency involved, GSA, HUD, and the community in which the facility will be located.[80] The affirmative action plan must contain provision for:

- An adequate supply of low- and moderate-income housing available on a nondiscriminatory basis.
- Affirmatively furthering nondiscrimination in the sale and rental of housing on the basis of race, color, religion or national origin.
- Implementation of the corrective action specified by HUD in its report to GSA.
- Transportation for low- and moderate-income employees between the old facility and the new facility until sufficient new housing is built.

There are two major weaknesses in the affirmative action requirements:[81]

- The responsibilities of HUD, GSA, the agency involved, and the community have not been clearly defined and mechanisms for remedying inadequacies have not been outlined.
- An adequate supply of housing need not be available until 6 months after occupation of the building. This substantially undermines the potential effectiveness of the requirement because employees affected by the unavailability of adequate housing might be unable to relocate with their agencies, thus losing most benefits they might derive from the affirmative action plan. Then, of course, if the community fails to carry out the affirmative action plan, but the agency has already relocated, the Federal Government has lost significant leverage which might have been used to require its implementation.

A discussion of these weaknesses, however, is largely theoretical. As of December 1977, no affirmative action plan had ever been developed under the memorandum, and only one, at Laguna Niguel, California, was in the draft stages.

The facility at Laguna Niguel can accommodate more than 3,000 employees,[82] but there is a shortage of low- and moderate-income level homes for sale or rent within a reasonable commuting distance from the facility.[83] Public transportation is limited.[84] HUD informed GSA that "adequate housing to satisfy lower income employees' needs is not available" in the Laguna Niguel area.[85]

GSA and HUD, in conjunction with State and local officials and agencies, agreed to develop an affirmative action plan, which, as of December 1977,

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[77] Douglas E. Chaffin, Acting Area Director, HUD, Philadelphia, Pa., memorandum to Theodore R. Robb, Regional Administrator, GSA, Philadelphia, Pa., Jan. 4, 1974.

[78] Affirmative action plans are discussed below.

[79] 41 C.F.R. § 101–17 (1976).

[80] HUD–GSA Memorandum of Understanding.

[81] Both of these weaknesses were noted in *To Provide. . .For Fair Housing,* p. 316.

[82] Arlene Haymes, Equal Opportunity Specialist, HUD, Region IX, San Francisco, Calif., telephone interview, Jan. 26, 1978 (hereafter cited as Haymes telephone interview.)

[83] GSA–HUD Orange County Affirmative Action Plan (undated draft).

[84] Haymes telephone interview.

[85] See Roland E. Camfield, Jr., Area Director, HUD, Region IX, Los Angeles, Calif., general area survey in letter to Clifton R. Jeffers, Area Regional Administrator for Equal Opportunity, GSA, San Francisco, Calif., Apr. 2, 1976. The median sales price of new housing in Orange County was $93,500. Rental units in the area averaged from $210 per month for a one-bedroom apartment to $340 per month for a three-bedroom apartment.

was in draft form. The plan is a reasonably sound one.[86] However, as of April 1978, the building in Laguna Niguel was virtually unoccupied; the affirmative action plan had not been signed; and HUD officials seriously doubted whether Orange County officials would ever agree to it.[87] HUD stated:

> further progress has been difficult because it has not been clear how many persons are to be moved. We understand that Federal agencies apparently are unwilling to occupy the building due to problems with its location and the lack of access to it. Thus, the building is still mostly unoccupied by Federal employees.[88]

GSA believes that the fact that only one affirmative action plan has been developed is evidence that its locational decisions have been in accord with the requirements of Executive Order 11,512[89] and the Memorandum of Understanding.[90] There is, however, considerable evidence that GSA and HUD, by not developing affirmative action plans, have failed to carry out the purposes of the Memorandum of Understanding. GSA wrote to this Commission:

> We disagree with the Commission's conclusion that the Agreement is ineffective because no affirmative actions have resulted. We contend that the fact that only one affirmative action plan has been required supports our earlier point that major GSA space actions are rarely the result of the geographical relocation of Federal activities. Furthermore, we feel that the very limited need for affirmative action plans indicates that our locational decisions are being made in accord with the letter and spirit of the Executive Order.[91]

However this Commission has found that in some cases affirmative action plans have not been developed where there is evidence of discrimination and an inadequate supply of low- and moderate-income housing.

In Columbia, South Carolina, in connection with a general area survey (a study of potential sites for Federal facilities), HUD found racially identifiable housing patterns, and no local or State fair housing law. The real estate industry as a whole did not voluntarily adhere to HUD's advertising guidelines[92] nor did it display HUD's fair housing posters. HUD concluded that there was *prima facie* evidence of a pattern or practice of housing discrimination in Columbia.[93]

As this Commission observed in 1974, GSA wrote to HUD requesting cooperation and the development of an affirmative action plan for Columbia.[94] HUD, however, did not agree to GSA's request. In 1978 it wrote to this Commission, "It should be noted that the planned facility was designed to consolidate scattered Federal operations; Federal employees were not to be relocated. The site was approved on this basis."[95] This rationale differs slightly from that which HUD had earlier provided to GSA when HUD asserted that a finding of housing discrimination in a general area survey where there were no plans for construction was not sufficient basis for the development of an affirmative agreement.[96] In any case, HUD was not willing to exercise its full authority under Title VIII to seek correction of the fair housing deficiencies without reference to GSA's plans.[97] GSA subsequently constructed a building in Columbia, South Carolina,

[86] GSA-HUD Orange County Affirmative Action Plan (undated draft). Under the plan, HUD would agree to monitor the housing production in the area to assure that all units are available on a nondiscriminatory basis. It would also agree to fund the production of 200 low- and moderate-income level housing units per year for 5 years in reasonable proximity to the Laguna Niguel facility. Such low- and moderate-income housing would comprise a combination of rental and purchase units. HUD would assist in the development and implementation of the counseling and referral system for Federal employees being relocated in the Laguna Niguel area. The draft affirmative action plan would require GSA to assume the role of primary liaison between Federal agencies moving into this Laguna Federal building and other parties to the affirmative action plan and the community. GSA would act as lead agency in development and implementation of the counseling and referral program for relocating employees and in development of a community orientation program for those employees. It would also coordinate matters of public transportation with the county. Under the plan, Orange County officials would facilitate administrative clearances required for the production of the low- and moderate-income level housing units for which HUD had agreed to provide assistance. The county would also agree to construct at least 200 housing units per year that would be funded through HUD block grant programs. The county would agree to continue to publicize information on the shortage of low- and moderate-income housing.

[87] Haymes telephone interview.

[88] Hubschman letter.

[89] 3 C.F.R. 898 (1966–1970 Compilation).

[90] Solomon letter and attachment to Goulding letter.

[91] Attachment to Goulding letter.

[92] T.M. Alexander, Jr., Acting Regional Administrator, HUD, Atlanta, Ga., letter to J.E. Smith, Regional Commissioner, Public Buildings Service, GSA, Atlanta, Ga., Feb. 22, 1973.

[93] For a discussion of HUD's advertising guidelines see chapter one, Department of Housing and Urban Development, section IV, A.

[94] *To Provide. . .For Fair Housing*, p. 319.

[95] Hubschman letter.

[96] HUD stated that such a plan should be developed only where residential relocation is involved and GSA has approved a final site for the building or leasing over the negative recommendation of HUD. HUD also stated that, although it had concluded that housing discrimination existed in certain areas, it had not given a negative recommendation on any general area.

[97] At a minimum, HUD could have sought the voluntary cooperation of the local government and real estate industry for the voluntary adoption of a comprehensive affirmative plan to remedy housing discrimination and ensure against such discrimination in the future. In the event that cooperation could not be obtained, HUD could have informed those segments of the real estate industry found to have discriminated that they would be terminated from any HUD programs in which they participated

and no affirmative action plan was developed. Officials in GSA's central office were unaware that HUD had found discriminatory housing in that city.[98]

The affirmative action requirement was also circumvented when the Social Security Administration proposed to expand its facility by constructing a new building in Woodlawn, Baltimore County, Maryland. In May 1973 GSA requested HUD to conduct a survey of the availability of low- and moderate-income housing on a nondiscriminatory basis for persons who would be employed at the new facility. From investigations, HUD found the Woodlawn site to have an insufficient supply of housing on a nondiscriminatory basis and determined that an affirmative action plan was necessary. Specifically, HUD found that approximately 592 units of low- and moderate-income housing would be needed to accommodate the estimated number of new low- and moderate-income employees who would work at the proposed facility.[99]

GSA challenged HUD's finding and proceeded with construction on the site.[100] GSA indicated that there were new plans for staffing the proposed facility, which would result in fewer new employees, and it requested that HUD provide a new market analysis of the area.[101]

HUD characterized the "new" staffing plan as one which merely hired new employees, assigned them to an existing Social Security Administration facility, and subsequently transferred them to the new facility.[102] GSA's viewpoint prevailed, nonetheless, and no affirmative marketing plan was developed. GSA officials told Commission staff, "What really happened [was that there was] no way Baltimore County would have agreed to an affirmative action plan" because the county did not want the new facility.[103] HUD, in contrast, wrote to this Commission:

> The discussion of the disagreement between HUD and GSA in regard to the Woodlawn facility is generally accurate, but does not focus adequately on HUD's efforts to prevent GSA from disregarding its findings. HUD recognized that GSA was attempting to circumvent the Memorandum and that the Memorandum did not require GSA to accept HUD's findings on housing availability and discrimination. HUD repeatedly requested meetings with GSA to revise the Memorandum so that HUD's recommendations could not be ignored by GSA. The desired revisions would have eliminated the types of problems raised by the Woodlawn situation. Some meetings were held with GSA, but no changes in the Memorandum resulted because GSA refused to agree to HUD's suggested revisions.[104]

V. Organization, Staffing, and Budget

Day-to-day responsibilities for implementing the HUD–GSA agreement at GSA is assigned to the regional staff. The person who oversees the agreement at the regional level is the Regional Director,[105] Public Buildings Service (PBS),[106] at GSA. The regional Public Buildings Service is one of a number of units within the regional office of GSA, and its director is responsible to the GSA Regional Administrator. Within the regional PBS, two divisions have primary responsibility for implementation of the HUD–GSA Memorandum of Understanding: (1) Planning and (2) Space Management.

The Planning staff handle the initial determination of and planning for Federal space needs. They conduct project development investigations and prepare project development reports based on these investigations. The Space Management staff are responsible for handling site investigations of specific proposed sites for construction and lease actions after GSA has determined that a new Federal facility will be developed and Congress has approved the plan.

Recommendations for specific sites are made to the Regional Director, PBS, by a team of Planning and Space Management staff, based on its investigations and on the advice of the relocation agencies and other Federal agencies, such as HUD, which

unless they took appropriate corrective and affirmative action, including participation in an areawide plan.

[98] Shipp and others interview.

[99] Gloria E. A. Toote, Assistant Secretary for Equal Opportunity, HUD, letter to Arthur P. Sampson, Administrator, GSA, Nov. 11, 1974 (hereafter cited as Toote letter, Nov. 11, 1974). The chronology of events is detailed in memorandum from William Kelly, Executive Assistant to the Secretary, HUD, to F. Lynn May, Associate Director, Domestic Council, the White House, Dec. 22, 1976.

[100] Arthur P. Sampson, Administrator, GSA, letter to Gloria E.A. Toote, Assistant Secretary for Equal Opportunity, HUD, Feb. 10, 1975.

[101] I.E. Friedlander, Acting Commissioner, PBS, letter to Gloria E.A. Toote, Assistant Secretary for Equal Opportunity, HUD, Oct. 25, 1974.

[102] Toote letter, Nov. 11, 1974.

[103] Shipp and others interview.

[104] Hubschman letter.

[105] GSA has regional offices in Boston, Mass., New York, N.Y., Washington, D.C., Atlanta Ga., Chicago, Ill., Kansas City, Mo., Ft. Worth, Tex., Denver, Colo., San Francisco, Calif., and Auburn, Wash.

[106] The Public Buildings Service employes 18,441 people and is the largest of the GSA services. It is responsible for the design, building or leasing, operation, protection, and maintenance of most of the federally-controlled buildings in the Nation.

were consulted pursuant to the Executive order. GSA's central office makes the final decision on site selections based on these recommendations.

The overall direction and coordination of the HUD–GSA agreements is the responsiblity of the central office Public Buildings Service located in Washington. This office has responsibility for making all final decisions on site selection. As a rule, however, the PBS central office almost never interferes with the site decision made by the Regional Administrator. In practice, only the most controversial relocations are sent to the central office for decision.[107]

According to information which GSA provided to the Office of Management and Budget[108] and subsequently reflected in the *Special Analyses of the Budget,* [109] in fiscal year 1978, GSA will allocate $1.2 million to assure that federally-constructed or leased space is located where there is an adequate supply of low- and moderate-income housing available on a nondiscriminatory basis. The estimated $1.2 million for fair housing will be for 43 full-time fair housing positions.[110] One GSA official stated that this figure represents about one-tenth of the time GSA spends on site selections and covers GSA's efforts to convince agencies to locate in central business districts. He stated, however, that this figure goes well beyond the amount of time GSA spends administering the Memorandum of Understanding and that GSA does not keep records on time spent implementing that memorandum. He noted, too, that GSA interprets the term "fair housing" broadly.[111] Earlier, another GSA Public Buildings Service staff member stated that the $1.2 million figure is wrong and that GSA budget staff "did not know what they were talking about."[112] Indeed, GSA has no fair housing staff to implement the HUD–GSA Memorandum of Understanding, and fair housing activities clearly comprise only a small fraction of the duties of those staff who have responsibilities relative to the memorandum.

In 1974 this Commission observed that there was a need for full-time fair housing staff and a director who would be responsible for fair housing matters throughout the agency and report to the Administrator.[113] This person would provide fair housing training, guidance, and oversight to staff who have responsibilities under the memorandum. Despite the strong evidence to the contrary, GSA believes that it does not need such assistance.[114]

VI. GSA's Fair Housing Role

On October 26, 1977, this Commission wrote to GSA stating that, at the request of the Office of Management and Budget, this Commission was gathering up-to-date information for a report on Federal agencies' fair housing activities. GSA's response to that request was to send this Commission an evaluation of the extent to which GSA can use the site selection process to further fair housing. This response, received January 24, 1978, is read most effectively in its entirety, and therefore it is reproduced in this chapter, followed by the Commission's reply to GSA.

Honorable Arthur S. Flemming
Chairman
U.S. Commission on Civil Rights
Washington, DC 20425

Dear Mr. Chairman:

As we indicated in our previous response to your October 26, 1977, letter requesting a reevaluation of the Commission's 1974 report entitled "To Provide. . .For Fair Housing," we have worked closely with your staff to update information and reassess the report's contents.

Since your request, we have had numerous contacts with your staff, both in meetings and telephone conversations. We believe that the information developed presents an accurate picture of our operations under Executive Order 11,512 and the Memorandum of Understanding between the Department of Housing and Urban Development and the General Services Administration (GSA). While time consuming, this project has given us the

[107] Loy Shipp, Jr., Assistant Commissioner, Office of Space Planning and Management; Darell Swayne, Deputy Director, Planning Division; and James Herbert, Realty Specialist, Public Buildings Service, interview, GSA, Nov. 27, 1977.

[108] J. Michael Daniel, Office of Budget, GSA, memorandum to Anne Hammill, Budget Analyst, Office of Management and Budget, "Federal Civil Rights Activities," Nov. 23, 1977.

[109] *Budget of the United States Government, Special Analyses,* Fiscal Year 1979, p. 283.

[110] U.S., General Services Administration, submission to the Office of Management and Budget pursuant to OMB Circular A–11, from J. Michael Daniel, Director of Budget, GSA, to Anne Hammill, Budget Examiner, Office of Management and Budget, Nov. 23, 1977.

[111] Statements by Loy Shipp in Shipp and Herbert interview.

[112] James Herbert, Realty Specialist, Office of Space Planning and Management, Public Buildings Service, GSA, telephone interviews, Jan. 5 and 6, 1978.

[113] *To Provide. . .For Fair Housing,* p. 326.

[114] Shipp and others interview.

opportunity to evaluate, realistically, GSA's role in promoting fair housing. This effort is particularly timely in view of the fact that the Administration is currently developing an urban policy.

As the final step of our joint effort, we are submitting the enclosed staff paper. Because the 1974 report is based on assumptions with which we cannot agree, we urge your full consideration of the contents of this staff paper. If there is additional information which we can provide, please let us know.

Sincerely,

Jay Solomon
Administrator

Enclosure

STAFF ANALYSIS OF U.S. COMMISSION ON CIVIL RIGHTS' 1974 REPORT "TO PROVIDE. . .FOR FAIR HOUSING"

General Overview

The thrust of the Commission's report was that GSA could do much more to promote fair housing objectives in communities where Federal activities are located. A thorough research of GSA's records related to our involvement and input to the preparation of the original report indicates that we supported many of the contentions of the report. The discussion provided below is written with the benefit of the experience of some six years of operation under Executive Order 11512 and the HUD/GSA Memorandum of Understanding, and is based on an objective analysis of GSA's programs and our actual ability to encourage local communities to take steps to eliminate discrimination in the provision of residential housing for low- and moderate-income persons.

In general, the report, while citing factual information accurately has drawn conclusions which distort the actual potential of GSA to effect any positive accompiishments in the area. In this regard, we believe that the Commission misunderstands our programs and responsibilities. We hope that this report and the recent research for and discussions with the Commission's staff will "clear the air" of misconceptions and enable GSA, the Commission and other Federal agencies to identify and contribute to solving the various socioeconomic problems of the nation.

Historical Perspective

In the late 1960's GSA came to realize that, as the "landlord" to the Federal Government, we were in a unique position to impact local economic development in certain ways. In conjunction with this awareness was the realization that through the administration of our various real estate management activities we could exert positive influences in support of the administration's socioeconomic goals. Of particular significance was the impact of decisions concerning the location of Federal activities. Within this conceptual framework, GSA drafted Executive Order 11512 to incorporate into our programs considerations which would, to the greatest extent practicable, support socioeconomic objectives such as: the rebuilding of the central city area and development of new areas; improving the accessibility and visibility of Federal facilities by maximizing the use of existing facilities; reducing unemployment by creating job opportunities, especially in the construction trades; and, encouraging the provision of low- and moderate-income housing on a non-discriminatory basis. This new Executive Order was signed by President Nixon in February 1970, superseding the previous Executive Order 11035. The new Executive Order included three new provisions setting forth our policies regarding the location of Federal facilities.

(1) In selecting sites GSA will consider the development, redevelopment of areas, the need for new communities, and the impact of selection on improving social and economic conditions. Such consideration will be accomplished in consultation with Department of Housing and Urban Development, Department of Health, Education, and Welfare, and the Department of Commerce, as appropriate;

(2) We will consider the availability of low- and moderate-income housing for employees to be housed and the adequacy of access and/or parking; and,

(3) To the greatest extent practicable, our plans will be consistent with state, regional and local plans and objectives.

On the issue of the availability of low- and moderate-income housing, GSA acknowledged its lack of expertise in making the appropriate determination necessary to implement the Executive Order. Consequently, we negotiated an agreement with the Department of Housing and Urban Development (HUD) wherein, at our request, HUD would provide GSA with the expert advice needed to

include the availability of low- and moderate-income housing as a consideration in the location of Federal facilities. That agreement clearly acknowledges the fact that an inadequate supply of low- and moderate-income housing for employees to be housed may not provide sufficient justification for the non-selection of a particular community for a Federal facility. That acknowledgement resulted in the provision in the agreement that affirmative action plans be developed jointly by HUD, the agencies to be housed, the local community and GSA when a locational decision is made contrary to the advice of HUD.

The Nature of GSA's Programs and its Experience

In assessing GSA's accomplishments in the area of promoting fair housing, there are several limiting factors which must be considered. First, with the exception of the construction of a limited number of residential units which have been built to provide housing for employees at remote border station facilities, GSA deals exclusively in the commercial/industrial real estate markets. We have no direct program authority for the implementation of national policy with regard to fair housing. We administer neither grant nor mortgage insurance nor housing subsidy programs through which we could exert leverage to encourage local housing industries to either develop low- and moderate-income housing, or eradicate discriminatory practices in the provision of such housing. Critical to this limitation is the fact that along with the lack of program responsibility, we lack any enforcement authority.

Secondly, as acknowledged in the Commission's report, agency location decisions are made jointly by the agency and GSA. In practical application, the agency determines the general area for location of their activities based on their mission requirements. After this determination is made, GSA, in consultation with the agency being housed, identifies the specific assignment location within the general area. This determination is based on the availability of space within our inventory to satisfy the agency's needs, and, if no space is available, leased space is acquired within an agreed upon delineated area. Thus, GSA is not in a position to favor a given city or community at the expense or "boycott" of another. Our ability to influence site selections is limited to areas within a given community where our client agencies have determined that facilities must be made available for delivery of Government services to citizens in that area. As will be discussed later, we believe it would be inappropriate, and in violation of the spirit of the 1964 Civil Rights Act, for us to adopt any other procedure with respect to the location of Federal activities.

Thirdly, it is important to note that GSA's space acquisition activities, whether through leasing or new construction, seldom involve the regional relocation of Federal agencies. Our leasing activities normally involve the contracting for space to achieve short term housing needs or to supplement the inventory of federally owned properties within a community. The construction of new Federal buildings is not justified on a speculative basis as in the private real estate market, but, rather, is based on demonstrated long term Federal housing needs of agencies already located in the community. Thus, new construction almost always involves the consolidation of scattered leased and obsolete Federal locations within a community into modern, first-class federally owned or leased space.

It is important to keep these limited factors in mind when reviewing GSA's operations under E.O. 11512 and the Memorandum of Understanding. We believe that appropriate attention has been devoted by GSA to the identification of low- and moderate-income housing for Federal employees. Further, it is our belief that our regional organizations have continued to refine their procedures to make certain that the analysis of the availability of such housing is comprehensive. For example, the 1974 report pointed out that many of our requests to HUD for advice were vague and, in some cases, did not refer to the HUD/GSA Agreement. A random sampling of regional requests, since the issuance of the report, reveals that our requests have improved in terms of specificity to the point that there is no doubt as to the information required.

Generally speaking, the scope of GSA's space actions are small, involving the relocation of limited numbers of employees to small amounts of space located short distances from their former locations. During FY 1977, for instance, 5,716 (97.4 percent) out of a total of 5,866 space assignment actions involved 25,000 sq. ft., or less. Furthermore, since the 1974 report 31 proposed GSA actions required consultation with HUD, only one of which resulted in the development of an affirmative action plan for the development of low- and moderate-income housing. That plan was developed in conjunction with a 5-year phased occupancy plan for the Laguna Niguel, California, Federal Building. This particular

building, located in Orange County outside the Los Angeles area, was a privately owned structure acquired by GSA in exchange for federally owned properties. The fact that the exchange was for an existing building obviously negated GSA's ability to determine its location, and, therefore, created a very unique situation. With the exception of the atypical case of Laguna Niguel, none of GSA's locational decisions, since E.O. 11512 and the HUD/GSA Agreement, have required the development of affirmative action plans. This leads us to the conclusion that our locational decisions have been made in accord with both the letter and spirit of E.O. 11512 and the HUD/GSA Agreement with regard to the availability of low- and moderate-income housing.

The foregoing should not be construed as an abrogation by GSA of responsibility for considering socioeconomic factors. On the contrary, we acknowledge the value of fully analyzing such factors and have recently incorporated into our prospectus development process analyses of a community's socioeconomic status. These analyses are provided as a supplement to the prospectus when it is submitted to the Office of Management and Budget prior to submission to the Congress. It is our belief that this information will serve as an aid to more fully identify the relative merits of our project proposals. Ancillary to these considerations will be the increased awareness by our operating officials of the need to properly evaluate all factors in developing major project proposals.

It is pertinent at this point to review GSA's recent history with respect to facility construction and to project the scope of our public buildings construction program for the foreseeable future in order to place into perspective GSA's actual potential for promoting fair housing on a nondiscriminatory basis. In June 1972, the Congress passed, and the President signed into law, the Public Buildings Amendments of 1972 (P.L. 92-313) which, in part, gave GSA special authority to provide financing for its backlog of construction projects. Under this 3-year authority, known as the purchase contract program, GSA constructed over 60 Federal building projects across the country. The majority of these projects are now completed and occupied. Although this has resulted in a large influx of new federally owned space into our inventory, most of these buildings either replaced obsolete Federal properties or leased space. The present trend is to providing space by lease, avoiding large capital expenditures. GSA's construction activities have been curtailed with FY 1978 construction appropriations equalling $20.5 million for the construction/acquisition of three border station facilities; transfer of three existing U.S. Postal Service properties; and the construction of a parking and vehicle maintenance facility.

GSA believes that, as a general rule, many of the nation's urban problems are the result of what has come to be known as the "flight to suburbia." To assist in the abatement of shifts from central city areas, especially by commercial activities, GSA has made concentrated efforts to locate Federal activities in downtown business areas in an attempt to revitalize such areas. Under the authority of Section 2(a)(2) of Executive Order 11512, our policy has been to focus our attention on locating in central business districts or urban renewal areas whenever an agency's mission will not be deleteriously impacted by a downtown location. The buildings constructed under the purchase contract program, mentioned previously, provided an excellent example of our success in carrying out our policy. Sixty of the 63 projects built under the authority are sited either in urban renewal areas or central business districts or the fringes thereof. Similarly, our leasing activities have been directed to downtown areas as opposed to suburban locations.

Recently we have published two new amendments to the Federal Property Management Regulations which will further promote our policy and the objectives of E.O. 11512. First, we amend subpart 101-18.1 to require that all delineated areas for leasing actions be restricted to the central business district, or fringes thereof, unless there is insufficient competition or such location has a negative impact on the agency's mission. The second amendment creates subpart 101-17.104, which establishes a procedure for agencies to appeal regional space assignments through GSA to the Administrator prior to appealing to the Office of Management and Budget. We view these new regulations as important steps toward encouraging agencies to accept downtown locations because they are now required to "bear the burden of proof" that downtown locations will seriously impair their ability to effectively carry out their missions.

GSA's Analysis of the 1974 Report

The basic assumption upon which the report is based is the contention that in carrying out its program responsibilities of housing Federal agencies, GSA

wields a great deal of "leverage" to force local Government and the local real estate industry to actively pursue fair housing objectives. The simple fact of the matter is that the extent of our influence is grossly overstated. This is true for a number of reasons. First, as pointed out earlier, GSA has neither program charter nor enforcement authority through which we could force local communities to work to assure fair housing. Thus, from the standpoint of encouraging fair housing through our program authorities, our efforts would at best be in the form of suggestion. Further, the report fails to recognize that there are distinct differences in the practices, financing, and ownership of commercial and residential properties, especially within the local real estate industry of larger urban areas. Generally speaking, the owners and agents in residential real estate markets are smaller, more locally oriented business persons; whereas, the commercial industry is more frequently involved with non-local, larger investment concerns. Thus, the subtle pressures which GSA could exert within local real estate markets and their financial institutions would not necessarily be directed at those individuals or groups on which the leverage would be effective. In reality, we believe the only effective leverage to bring communities into compliance rests in those areas which include housing assistance/grant programs; mortgage insurance; and, investigation/enforcement activities.

Finally, the report presumes that the siting of Federal activities in a community is of great benefit because Federal employees have assured and stable income levels, often higher than average for the community. In addition, the Federal presence attracts further development and signals to the private sector that the community is prospering. While these presumptions are generally true, local community leaders do not always accept GSA's space activities without reservation. As discussed earlier, our construction projects seldom result in substantial increases in employment in the affected areas, but rather create shifts of activities from leased space to federally owned properties. From the standpoint of the local government, increased federal ownership, especially for valuable commercial properties, means reductions in local real estate tax revenues. Similarly, from the standpoint of the local real estate industry, such shifts result in an increased vacancy rate for commercial properties, as well as the loss of very desirable Federal tenancy. Furthermore, in those rare cases when GSA's space acquisition activities result in substantial increases in Federal employment in a community, local interests must temper their enthusiasm over the actions with a realization that the influx of Federal employees and further spin-off development will likely create costly demands for increased governmental services, such as public schools, roads, sewer and sanitation systems police and fire protection, and public utilities. Therefore, we must use caution in making the presumption that increased Federal presence in a community is universally viewed as a highly desirable situation through which GSA may exert pressure.

From its basic assumption of GSA's leverage, the report develops an argument for the "boycotting" of communities which practice discrimination in housing. The report then draws from this argument to recommend that such communities not only be boycotted but that E.O. 11512 be revised to require agencies to relocate from those communities. Even though we do not have expertise in these matters, we find it difficult to believe that there is any community in the country which is completely free from discrimination in its housing practices. We find this pattern of logic naive, at best. To require agencies to refrain from locating in, or relocating from a given community, is not only impractical but tantamount to denying citizens the right of easy access to vital governmental services, such as the courts and law enforcement activities, social services, various forms of technical assistance, veterans assistance and postal services. Further, this recommendation is in direct conflict with the Civil Rights Act of 1964 (42 U.S.C. 2000d), which specifically states that it was not the Congress' intent to require the wholesale cutoff of all Federal programs, but rather that Federal aid be withheld only in particular areas in which the discrimination exists.

Conclusion

We believe that through the administration of GSA's programs, we have made valuable contribution to a solution of the problems facing the central areas of our cities. Our policies for locating Federal activities to foster the redevelopment of blighted urban areas have and will continue to be developed in a manner that will support the Administration's objectives. As this report has pointed out, our greatest impact and influence is within the commercial real estate sector. By locating our facilities in central business districts and urban renewal areas,

we attract private commercial concerns to co-locate in these areas. Our presence encourages the improvement of local public transporation systems. Increased employment, whether from the Federal or private sector, attracts increased retail businesses during normal business hours. New authorities granted GSA under the Public Buildings Cooperative Use Act of 1976 (P.L. 94–541) make it possible for us to extend the use of Federal facilities to non-Federal activities for commercial, cultural, educational, recreational and retail uses, both during and beyond normal business hours. The law also allows us to acquire, by lease or purchase, properties of historic significance. By preserving structures which are symbolic of the character of a city and increasing the attraction of the center city, we will play a vital role in rebuilding the nation's cities, physically, economically and socially.

In the area of residential housing, our influence is severely restricted, as discussed above. We believe that the consideration of a community's fair housing practices is an important factor in our program decisions, however, we believe it is equally important to recognize the limitations of our influence in this area. To revise our policies as recommended in the Commission's report would ultimately deprive those areas with the greatest need of Federal assistance and guidance—a situation which works at odds with the elimination of all forms of discrimination.

General Services Administration
Public Buildings Service
Office of Space Planning and Management
January 16, 1978

Response of the U.S. Commission on Civil Rights to the General Services Administration

After reviewing GSA's letter carefully, this Commission stands by the conclusions in its 1974 report, *To Provide. . .For Fair Housing.* We continue to believe that when the Government locates a Federal facility, this activity should further the goals of fair housing. We also adhere to our position that the General Services Administration must play a central role in ensuring that fair housing goals are an integral part of the process of locating Federal agencies.

It is our view that absent some compelling reason, the Government should not relocate jobs where minorites or women cannot find or afford housing. It should not place its facilities where housing is segregated. Before moving employees to any location which does not offer fair housing, the Federal Government must require a firm commitment by the local government and all segments of the real estate industry, to correct past inequities and to take vigorous affirmative action to ensure against future discrimination. In his letter, the Administrator of General Services has raised a number of problems with the implementation of such a policy. In this chapter, in conjunction with our discussions of such topics as the impact of new Federal facilities, Executive Order No. 12072, the HUD–GSA Memorandum of Understanding, and affirmative action requirements, we have tried to respond to those problems.

One issue which GSA raises is given separate attention in this section—the issue of GSA's role to ensure that site selection and relocation activities are used to further the goal of fair housing. In its letter GSA asserts that the basic assumption upon which this Commission's 1974 report is based is the contention that "GSA wields a great deal of 'leverage' to force local Government and the real estate industry to actively pursue fair housing objectives." GSA further asserts that the Commission has "grossly overstated" the extent of GSA's influence.

The Commission agrees that the underlying premise of its 1974 report, and, indeed, its current report on GSA's fair housing efforts, is that GSA can and should utilize its influence over the Federal site selection process to further fair housing. We do not believe, however, that either the 1974 report or the present draft overstates the extent of this influence or its potential for affecting positive change in the housing field.

GSA's space acquisition activities provide it with a unique opportunity to ensure that when Federal agencies choose sites for new physical facilities, or relocate, these activities are used to further fair housing. GSA's policies of locating Federal facilities in downtown business areas and fostering the redevelopment of blighted and urban areas demonstrate that GSA clearly does have the capacity to exert positive socioeconomic influence. The fact that GSA views its role in rebuilding the Nation's cities as a vital one is to be commended. However, GSA can do much more to ensure that decisions affecting the location of Federal agencies are used as an

affirmative tool in the Government's effort to combat housing discrimination. As the Federal agency with the central role in acquiring and assigning space for other Federal agencies, the most effective approach to fair housing for GSA is that of leader and coordinator throughout the site selection and relocation process. Among the specific functions which we believe GSA could actively implement are:

- Ensuring that GSA relocation policies, including its regulating procedures and interagency agreements, fully reflect the goals of fair housing, as articulated in Title VIII of the Civil Rights Act of 1968.
- Ensuring that with each relocation, Federal agencies are held accountable for cooperating with GSA pursuant to Executive Order No. 12072 in the consideration of fair housing.
- Ensuring that HUD collects the fair housing information necessary for decisions about a) where Federal agencies should relocate and b) what affirmative steps communities should take before they are selected as the location for a Federal facility.
- Ensuring that no relocation decisions to which the HUD–GSA Memorandum of Understanding applies are made until agencies have considered the fair housing information which HUD has collected. GSA has stated that it cannot "force agencies to utilize" HUD data but "will make such information available."[115]
- Soliciting the support of local public and private groups for implementing any remedial actions which have been identified by HUD as necessary for achieving equal housing opportunity.[116]
- Ensuring that where there are fair housing violations which communities will not correct through an affirmative action plan or other voluntary steps, no relocation decisions to which the HUD–GSA Memorandum of Understanding applies are made until Federal agencies with enforcement power are alerted to the violations.[117]

The Commission is cognizant that GSA does not completely control the site selection process, but rather shares its decisions with the relocating agencies. We are also aware of GSA's lack of enforcement capability. However, GSA's fair housing role is not isolated from that of other Federal agencies, such as the Departments of Justice and Housing and Urban Development and the agencies which are being relocated. We believe that under GSA's leadership and with the help of these agencies, the Federal site selection and relocation processes can contribute to the realization of the Nation's fair housing goals.

[115] Attachment to Goulding letter.

[116] GSA wrote to this Commission.

> In our experience in developing the affirmative action plan for the Laguna Niguel Federal Building, GSA took the lead in its development in cooperation with HUD and the local elected officials of Orange County. More recently, we have initiated a program of soliciting the early advice of mayors and other local officials as to the optimum location of Federal activities to promote the development objectives of the community. Attachment to Goulding letter.

[117] As discussed in the chapter in this report on the Department of Housing and Urban Development, HUD lacks enforcement power under Title VIII.

Chapter 8

OTHER AGENCIES

Summary

Based on a survey of 55 executive agencies not covered in the first seven chapters of this report, this chapter identifies a number of leverages which the Federal Government possesses for ensuring fair housing in this country.

Section 808(d) of the Civil Rights Act of 1968 requires all executive departments and agencies to administer their programs and activities relating to housing and urban development in a manner to further affirmatively the purposes of Title VIII. Consistent with this Title VIII mandate, Federal agencies are responsible for ensuring that jurisdictions receiving Federal funds for community development take positive steps to practice fair housing. However, in the absence of regulations by the Department of Housing and Urban Development (HUD) to explain Section 808(d), Federal agencies differ widely in their acceptance of fair housing duties. Some agencies, including the Department of Commerce and the Environmental Protection Agency which administer community development programs, have concluded that their programs do not fall within the meaning of the Section 808(d) phrase, "programs relating to housing and urban development." They have not acknowledged any duty to impose Title VIII fair housing standards on their recipients. Funds from these programs may be used for the same kinds of activities which the Department of Housing and Urban Development supports through its community development block grant program, and they thus offer alternative sources of financing to communities that do not wish to comply with HUD's fair housing requirements. As a result, the absence of fair housing requirements in these other community development programs may serve to undermine the fair housing provisions which HUD has required under the Housing and Community Development Act of 1974, as amended.

Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, all Federal agencies whose activities result in the residential displacement of persons must ensure that replacement housing is available on a basis consistent with Title VIII of the Civil Rights Act of 1968. However, GSA guidelines to Federal agencies pursuant to the Relocation Assistance Act provide no instruction for carrying out this responsibility.

The Equal Employment Opportunity Commission (EEOC) interprets Title VII of the Civil Rights Act of 1964 to require employers to take action to overcome or compensate for any adverse effects which housing discrimination may have on the composition of their work forces. Such action might include, for example, choosing sites in close proximity, or with convenient transportation, to an adequate supply of low- and moderate-income housing and nondiscriminatory housing. The Office of Federal Contract Compliance Programs (OFCCP), which shares with EEOC the responsibility for eradicating employment discrimination in the private sector, has also adopted a similar policy in its regulations, but as of December 1977, had remained silent on whether corporate relocations which adversely affect the employment opportunities of minorities violated Executive Order 11,246. Moreover, the Federal Government does not fully recognize a fair housing responsibility for its own employees. Although GSA and HUD must consider the availability of adequate low- and moderate-income housing on a nondiscriminatory basis in the acquisition or assignment of Federal space, as discussed in chapter 7, few Federal agencies provide fair housing services to employees and prospective employees in order to ensure that

housing discrimination does not serve as a barrier to employment.

Federal surplus real property offers a potential resource to help some localities meet their need for low- and moderate-income housing. Despite this potential, HUD has taken a passive role in securing Federal surplus property for low-income housing and, as a result, less than 1 percent of the Federal real property that becomes surplus is used for low- and moderate-income housing. No Federal agency surveyed by this Commission has policies or procedures to facilitate such usage.

The Federal Government has a number of responsibilities to ensure that lending institutions practice equal opportunity in their mortgage lending programs. As regulators of financial institutions, many of which make home mortgages, the Farm Credit Administration and the National Credit Union Administration must ensure that these institutions do not violate Title VIII of the Civil Rights Act of 1968 and the Equal Credit Opportunity Act. As depositors of Federal funds, agencies such as the Department of the Treasury have responsibility to ensure that the depository institutions they select do not discriminate in mortgage finance.

I. Introduction

In addition to the 10 agencies discussed in the first seven chapters of this report, there are a number of other Federal agencies with fair housing responsibilities. These responsibilities and the agencies which have them were identified by this Commission through a fair housing questionnaire sent to 55 Federal departments and agencies,[1] interviews, and agency documents.

This chapter illustrates the myriad ways the Federal Government has to pursue the purposes of Title VIII. Section II discusses the Federal Government's responsibility to assure nondiscrimination in housing in communities that receive Federal funds for community development; Section III, the Government's responsibility to assist in finding replacement housing on a nondiscriminatory basis; Section IV, its responsibility to ensure that housing discrimination is not a barrier to equal employment opportunity; Section V, its responsibility to utilize Federal surplus property to meet needs for low- and moderate-income housing;[2] Section VI, its responsibility to ensure that financial institutions with which it does business provide equal opportunity in their mortgage lending activities; and Section VII, the resources the Government allocates to implementing these responsibilities.

Section 808(d) of the Civil Rights Act of 1968 gives the Government broad authority to ensure equal housing opportunity by requiring all executive departments and agencies to administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of Title VIII.[3] However, no regulations have been promulgated by HUD, the principal agency for administering Title VIII, or by any other agency to explain the meaning of this section or the procedural steps executive agencies with diverse missions should take to define their affirmative duties.

[1] In January 1978 this Commission surveyed 55 executive departments and agencies, not covered in the first seven chapters, to obtain a comprehensive view of the Federal effort to end discrimination in housing. The Federal executive departments and agencies surveyed were: Departments of Commerce; Energy; Health, Education, and Welfare; Interior; Labor; State; Transportation; and Treasury; ACTION; American Battle Monuments Commission; Appalachian Regional Commission; Board for International Broadcasting; Civil Aeronautics Board; Commission of Fine Arts; Community Services Administration; Commodity Futures Trading Commission; Environmental Protection Agency; Equal Employment Opportunity Commission; Export-Import Bank of the United States; Farm Credit Administration; Federal Communications Commission; Federal Election Commission; Federal Maritime Commission; Federal Mediation and Conciliation Service; Federal Trade Commission; Foreign Claims Settlement Commission of the United States; Indian Claims Commission; Inter-American Foundation; Interstate Commerce Commission; National Aeronautics and Space Administration; National Credit Union Administration; National Foundation on the Arts and the Humanities; National Labor Relations Board; National Mediation Board; National Science Foundation; National Transportation Safety Board; Nuclear Regulatory Commission; Occupational Safety and Health Review Commission; Overseas Private Investment Corporation; Panama Canal Company; Pennsylvania Avenue Development Corporation; Pension Benefit Guaranty Corporation; Postal Rate Commission; Railroad Retirement Board; Renegotiation Board; Securities and Exchange Commission; Selective Service System; Small Business Administration; Tennessee Valley Authority; United States Arms Control and Disarmament Agency; United States Civil Service Commission; United States Information Agency; United States International Trade Commission; and United States Postal Service.
Each of the 55 agencies was sent the same questionnaire, which asked the agency to identify its participation in certain programs and activities, the organization and staffing for carrying out its fair housing responsibilities, the implementation of these responsibilities, and interagency coordination on fair housing. This questionnaire is separate from the individually tailored list of questions sent to each of the major housing agencies discussed in this report.

[2] The relationship between fair housing and the provision of low-income housing is discussed in the chapter on the Department of Housing and Urban Development.

[3] 42 U.S.C. § 3608 (1970). Although Section 808(d) of Title VIII provides broad authority for executive agencies to pursue the purposes of Title VIII through the administration of their programs and activities, there are also other equal housing opportunity authorities. The major ones are Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000(d)–2000d-6 (1970), the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. §§ 1415, 2473, 3307, 4601, 4602, 4621–4638; 4651–4655; 49 U.S.C. § 1606 (1970)); Exec. Order No. 11,063 (3 C.F.R. 652 (1959–1963 Compilation)); Exec. Order No. 11,512 (3 C.F.R. 898 (1966–1970 Compilation)), and the Equal Credit Opportunity Act (15 U.S.C. §§ 1691–1691f (1976)).

In the absence of regulations, Federal agencies differ widely in their acceptance of fair housing duties. The programs of the Commodity Futures Trading Commission (CFTC) and the National Labor Relations Board (NLRB), for example, are not related to housing and urban development. Both recognize that, under Title VIII of the Civil Rights Act of 1968, they are responsible for ensuring fair housing for their employees. When asked to describe the nature of the agency's Title VIII responsibility, CFTC wrote, "Our responsibility is to ensure that equal and fair housing opportunities are afforded to our employees especially when government monies are used for their relocation".[4] In a similar vein, NLRB stated:

> In addition to issuing special notices to Agency employees concerning equal housing opportunity laws and activities, the NLRB has been providing counseling and referral services, maintaining supplies of program literature, and advising employees on the filing of complaints with HUD.[5]

In contrast, a number of other agencies whose programs were unrelated to housing and urban development did not recognize their fair housing responsibility. For example, the National Transportation Safety Board (NTSB) and the National Mediation Board (NMB) denied that they had any fair housing duties.[6] The National Transportation Safety Board stated:

> The mission of the National Transportation Safety Board is almost totally involved in the investigation of transportation accidents, and development of safety recommendations which will improve unsafe conditions. We have no activity in the housing area.[7]

Similarly, the National Mediation Board wrote, "We wish to advise that the National Mediation Board is a small Government agency, and does not currently engage in any fair housing activities."[8]

Some Federal agencies did not acknowledge having fair housing responsibilities which they were, in fact, executing. When agencies were asked if they were members of the Federal Equal Housing Opportunity Council, a 52-member interagency body sponsored by the Department of Housing and Urban Development,[9] 8 who are members did not acknowledge that they were members of the council.[10] The Consumer Product Safety Commission signed an Interagency Fair Housing Agreement with HUD,[11] but made no mention of this activity in their response to this Commission's question on interagency coordination.[12]

II. Community Development

A. Statutory Responsibilities

Because the Federal Government provides assistance for community development, it has responsibility under Title VI of the Civil Rights Act of 1964 to make certain that its recipients operate federally-assisted programs on a nondiscriminatory basis. Federal agencies must ensure that for the programs they fund:

> . . .to assist Federal Government agencies as they administer programs and activities related to housing and community development in a manner that affirmatively furthers fair housing opportunities for all Americans and to assure that this mission was accomplished in each of the offices and installations of these departments and agencies nationwide. U.S. Department of Housing and Urban Development, *The Federal Government Fair Housing, 1976.*

[4] Commodity Futures Trading Commission, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 23, 1978. The Commodity Futures Trading Commission exists to strengthen the regulation of futures trading and to bring under regulation all agricultural and other commodities traded on commodity exchanges. Established in 1975, it currently has a permanent work force of 445.

[5] National Labor Relations Board, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 16, 1978. The National Labor Relations Board investigates and settles labor disputes, safeguards employees' rights to organize, and prevents unfair labor practices.

[6] Other agencies that denied they had any fair housing responsibility included: U.S. Department of the Treasury; U.S. Department of Energy; Appalachian Regional Commission; Securities and Exchange Commission; and U.S. Civil Service Commission. Responses to U.S. Commission on Civil Rights Fair Housing Questionnaire.

[7] National Transportation and Safety Board, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 19, 1978.

[8] National Mediation Board, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 10, 1978. The Board is charged with mediating disputes between rail and air carriers and employee organizations concerning pay, rules, and working conditions.

[9] The Federal Equal Housing Opportunity Council is located within the Office of Voluntary Compliance under the Assistant Secretary for Equal Opportunity. Member agencies on the Council are chosen by HUD. The Council was undertaken by HUD to fulfill part of its technical assistance and educational responsibilities under Section 808(e) of Title VIII of the Civil Rights of 1968. The purpose of the Council is:

[10] The eight agencies are the Departments of State; Health, Education, and Welfare; and the Treasury; the Farm Credit Administration; Renegotiation Board; Federal Mediation and Conciliation Service; Consumer Product Safety Commission; and National Foundation on the Arts and Humanities.

[11] One of the Federal Equal Housing Opportunity Council's major objectives is to obtain an Interagency Fair Housing Agreement with each member agency. The agreement details the obligations of each signatory agency and HUD in order to implement the Council's objectives in setting up a housing locator service, pursuing fair housing in agency site selection activities, and using program funds to further fair housing.

[12] On May 17, 1976, the U.S. Consumer Product Safety Commission signed the Interagency Fair Housing Agreement with HUD. In its response to this Commission's Fair Housing Questionnaire, the Consumer Product Safety Commission stated, "the Consumer Product Safety Commission is not conducting any activities related to fair housing issues, and the Commission's response to each question is negative or not applicable." U.S. Consumer Product Safety Commission, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Feb. 3, 1978.

> . . .no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[13]

If minorities are barred from a community because of overt discriminatory housing practices or practices which effectively exclude their presence,[14] they are also excluded from participating in or from receiving the benefits of any Federal assistance which only accrues to residents of that community. This Commission believes that such exclusion would be a violation of Title VI.[15]

Title VIII of the Civil Rights Act of 1968 prohibits discrimination in housing. If minorities are barred from a community because of housing discrimination or exclusionary zoning practices, Title VIII or its intent is violated. Consistent with the Title VIII mandate to further fair housing affirmatively through the administration of their programs and activities, Federal agencies have a responsibility to assure that jurisdictions receiving Federal funds for community development take positive steps to practice fair housing.

To ensure that minorities are not effectively excluded from federally-assisted programs, communities receiving Federal assistance for community development could be required to:

- End any exclusionary zoning practices or land use policies which are discriminatory in effect.
- Provide their fair share of housing for persons of low and moderate income.
- Promote equal opportunity in the sale and rental of housing and in mortgage lending.

B. Community Development Agencies

In addition to the Department of Housing and Urban Development,[16] the other major Federal agencies that provide community development assistances are: the Departments of Commerce, the Interior, Transportation, and the Treasury; the Appalachian Regional Commission; Community Services Administration; the Environmental Protection Agency; and the Tennessee Valley Authority.

While the agency or program missions vary, these agencies provide funds for a variety of activities that help to develop communities and urban areas. The Economic Development Administration (EDA) in the Department of Commerce[17] provides loans and grants for public works and development facilities that are needed to attract or revive industrial opportunities and encourage business expansion. Eligible EDA projects include water and sewer facilities, streets, and access roads for commercial or industrial users, shopping centers, and regional airports.

The Department of the Interior (USDI) funds small reclamation projects such as municipal water supplies, recreation development, flood control, or single purpose irrigation or drainage. It also provides funds for the acquisition of land for and development of picnic areas, outdoor swimming pools, inner-city parks, and open space.[18] The Department of Transportation (DOT) provides grants to communities for highways, roads, urban and regional mass transit systems, and airports.[19]

Through the Office of Revenue Sharing (ORS), the Treasury Department provides entitlement funds

[13] 42 U.S.C. § 2000d (1970).

[14] For example, a community in which real estate agents practice "steering," i.e., directing minority clients to predominantly minority areas and white clients only to white areas, denies minorities the choice of locations in that community. "Steering" also takes place in regional areas where the effect of the practice results in "white towns" and "minority towns." A community that does not have a sufficient supply of low- and moderate-income housing, in effect, excludes low- and moderate-income persons, many of whom are minorities, by the fact that such persons cannot find housing they can afford.

[15] The Federal Government may administratively enforce compliance with Title VI by terminating or denying program funds to these communities after a hearing and a finding of noncompliance or by any other means authorized by law, including referring the matter to the Department of Justice for judicial action. 42 U.S.C. § 2000d–1 (1970). See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. VI, *To Extend Federal Financial Assistance* (hereafter cited as *To Extend Federal Financial Assistance)* (November 1975), p. 14.

[16] HUD's community development programs are discussed in the chapter on HUD.

[17] EDA provides major assistance for improving the economies of communities and areas burdened by high unemployment or low income. EDA also assists areas that have or are expected to experience a sudden rise in unemployment because of the closing of a major source of income, or areas experiencing a substantial loss of population due to lack of job opportunities. EDA programs are designed to help create jobs or to avert job losses. For example, EDA's "Public Works Impact Program" is designed to create immediate jobs for construction workers in areas of high unemployment.

[18] Major USDI community development assistance is provided by the Bureau of Outdoor Recreation's Land and Water Conservation Fund and the Bureau of Reclamation's water resources programs.

[19] Major DOT community development programs are the Federal Highway Administration's Federal-Aid Highway Program, which provides assistance to States for building or reconstructing interstate highways, other roads, including urban streets, and related structures such as bridges, bikeways, pedestrian walkways, parking facilities, and rest areas; the Urban Mass Transit Administration's programs for constructing, improving, acquiring facilities and equipment for metropolitan and local bus systems and rapid transit systems; and the Federal Aviation Administration's program for constructing, improving, and maintaining area and municipal airports.

to localities that can choose to spend it on community development activities.[20] The Appalachian Regional Commission (ARC) is a joint Federal-State partnership concerned with the economic, physical, and social development of the 13-State Appalachian region. It assists the States in obtaining Federal funds for a broad spectrum of economic development programs, including the construction of a highway system and access roads, construction and operation of multicounty health projects, construction of sewage treatment facilities, and the provision of technical assistance and loans for planning low- and moderate-income housing construction.[21]

The Community Services Administration (CSA) provides assistance for industrial parks, improved housing, and job training in order to strengthen the economic base of poverty areas through the creation of new businesses and jobs.[22] The Environmental Protection Agency (EPA) provides assistance to State and local governments for sewage treatment facilities.[23] With the enactment of the 1977 amendments to the Water Pollution Control Act of 1972, EPA will also engage in the construction of sewage collection lines.[24] The Tennessee Valley Authority (TVA) provides electric power, flood control, and recreation improvement for the Tennessee Valley region.

C. Recognition of Fair Housing Responsibilities

Although all of the community development agencies surveyed recognize that they have Title VI responsibilities, none responded affirmatively when asked if they had responsibility for ensuring that recipient communities practice fair housing.[25] There are at least two factors which have contributed to these agencies' failure to recognize their responsibilities for ensuring that recipient communities practice fair housing. First, some agencies disagree that their community development programs fall within the meaning of the Section 808(d) phrase "programs relating to housing and urban development" which must be administered affirmatively to further fair housing. The Department of Commerce, for example, has stated that "EDA does not provide assistance for housing. EDA assistance is provided to improve the economy of an area."[26] Similarly, the Environmental Protection Agency wrote:

> The main thrust of EPA's major grant program is to assist in construction of necesssary sewage treatment facilities by communities. We do not limit assistance only to communities which practice fair housing.
>
> We are looking at the interrelation of our Wastewater Treatment Municipal Construction Grant Program and fair housing but do not consider the grant program to be fundamentally a community development or housing program. We do think we should cooperate with HUD in carrying out purposes of Title VIII—Fair Housing Act of 1968.[27]

Both the Department of Commerce[28] and EPA[29] fail to recognize how closely their programs are

[20] The Office of Revenue Sharing dispenses revenue sharing funds on an entitlement basis to localities, based on their population.

[21] Project proposals originate in States. When the Appalachian Regional Commission determines that a proposal is consistent with ARC's general plan for regional development, the proposal is passed to a Federal agency which funds that type of program.

[22] The Community Services Administration assists low-income families and individuals in attaining economic efficiency. CSA provides community development assistance through its Community Economic Development Program.

[23] EPA's major program is the Waste Water Treatment Construction Program.

[24] The Clean Water Act of 1977, P.L. 95-217, 91 Stat. 1566 (to be codified in 33 U.S.C. § 1251).

[25] The Departments of Commerce, Energy, the Interior, and Transportation; the Appalachian Regional Commission; Community Services Administration; Environmental Protection Agency; Pennsylvania Avenue Development Corporation; and Tennessee Valley Authority, responses to the U.S. Commission on Civil Rights Fair Housing Questionnaire. The Department of Energy and the Appalachian Regional Commission made no recognition of any Title VIII responsibility. The Department of Commerce recognized its Title VIII responsibility primarily with respect to providing equal housing opportunity for its employees and relocation assistance; the Pennsylvania Avenue Development Corporation, only with respect to relocation assistance. Although the Interior, Transportation, CSA, EPA, and TVA responded that they had Title VIII responsibility, their interpretation of it did not include the responsiblity to ensure that recipient communities practice fair housing.

[26] U.S., Department of Commerce, response to U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 20, 1978.

[27] U.S., Environmental Protection Agency, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Mar. 6, 1978.

[28] In August 1978, this Commission sent the Department of Commerce a draft section of this report pertaining to Commerce for comment. The Department of Commerce wrote the following in response to this Commission's request:

> Secretary Kreps has asked me to respond to your letter of August 1, 1978 in which you requested comments on your draft report on Fair Housing. We have reviewed the draft report and do not wish to offer comments. We do, however, want to thank you for the opportunity to comment. I am certain your report will assist in furthering fair housing goals and I wish you every success in these endeavors. Calvin Brooks, Director, Office of Civil Rights, U.S. Department of Commerce, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 11, 1978.

[29] In August 1978, this Commission sent the U.S. Environmental Protection Agency a draft section of this report pertaining to EPA for comment. EPA wrote the following comments:

> Thank you for the opportunity to comment on your prospective updating on your 1974 report, "To provide. . .For Fair Housing". The portions of the prospective report which you furnished for our review are accurate and correct insofar as they describe EPA's past activities and positions respecting the Agency's fair housing responsibilities. We presently are re-examining our position in this area in light of the changes worked in our Construction Grant Program by the 1977 Amendments to the Federal Water Pollution

related to both housing and urban development. For example, increasing an area's sewage treatment capacity can facilitate the expansion of new sewer connection lines, which in turn can foster development and the provision of housing.[30] Similarly, other Federal community development activities, such as land acquisition for conservation of open space, the provision of recreational opportunities, senior centers, parks, playgrounds, neighborhood facilities, street improvement projects such as lights, economic development activities, and fire protection facilities and equipment are clearly related to the development of urban areas and also contribute to the quality of housing.[31]

Second, HUD has failed to exercise leadership in providing needed fair housing standards for communities that receive funds for development. HUD, under Title VIII, has major leadership responsibility in housing for all executive agencies.[32] In the absence of HUD guidance in the form of regulations, the community development agencies discussed in this section have not acknowledged their authority to impose Title VIII fair housing standards on recipients of Federal community development programs.[33]

In the absence of Government-wide standards for the application of Title VIII to community development programs, Federal agencies have ruled inconsistently on Title VI and Title VIII matters. For example, in 1973 EPA ruled that Title VI was no bar to providing assistance to two Connecticut jurisdictions that had zoning ordinances which effectively excluded low-income housing. In April 1974 EPA awarded $2.2 million to Avon and $3.3 million to Glastonbury.[34] USDI,[35] on the other hand, took the action of temporarily withholding the approval of grant applications of Redding, Connecticut, and three other surrounding Connecticut jurisdictions.[36] In 1975 USDI ruled that Redding and the State A-95 review agency for civil rights must resolve their disagreement over the A-95 agencys' allegation that Redding violated civil rights statutes. The Connecticut Commission on Human Rights and Opportunities charged that Redding violated Title VI of the Civil Rights Act of 1964 because of discriminatory residency policies for parks and open space, Title VII of the Civil Rights Act of 1964 because of discriminatory employment practices, and Title VIII of the Civil Rights Act of 1968 because of exclusionary zoning practices.[37] Redding disagreed.

Finally, the absence of Goverment-wide guidelines on administering community development programs affirmatively to further Title VIII may offer a loophole to communities that do not wish to comply with the fair housing requirements of the

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Control Act.

We agree with your conclusion that the absence of Government-wide guidelines for affirmatively administering fair housing requirements does inhibit activities of the disparate assistance programs discussed in your report. Doris C. Thompson, Director, Office of Civil Rights, U.S. Environmental Protection Agency, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 26, 1978.

[30] The following case illustrates this relationship. In 1970 the State of Maryland banned new sewer connections in the Maryland counties making up the suburban areas near Washington, D.C. The ban was imposed "because of actual and threatened overloads on the area's sewage treatment capacity, the result of rapid suburban growth in the postwar years." The ban on sewage lines has severely limited development and construction of housing in nearby Montgomery and Prince George's Counties, Maryland. On May 18, 1978, this ban was lifted because of expanded sewer capabilities in the areas.

EPA's position in 1978 on the inclusion of sewage treatment programs within the meaning of Title VIII has not changed substantively from its position in 1974. In 1974 EPA contended that its major grant program, the municipal wastewater treatment works construction grant program, was not a "housing and community development program" within the strictest interpretation of the term. *To Extend Federal Financial Assistance*, p. 589.

[31] For example, housing that is near parks and recreational opportunities, and in a neighborhood serviced by modern fire protection facilities, is likely to be more desirable than housing that does not have these advantages.

[32] 42 U.S.C. § 3608(1970).

[33] Departments of Commerce, the Interior, and Transportation, the Appalachian Regional Commission, EPA, and TVA, responses to U.S. Commission on Civil Rights Fair Housing Questionnaire.

[34] *To Extend Federal Financial Assistance*, p. 599.

[35] In August 1978, this Commission sent the Department of the Interior a draft section of this report pertaining to USDI for comment. In response, USDI wrote: "I want to thank you for permitting us to review the segments of your research, pertaining to the Department of the Interior, prior to putting it into final form." Edward E. Shelton, Director, Office for Equal Opportunity, U.S. Department of the Interior, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 15, 1978.

[36] In 1974 the town of Redding, Connecticut, applied for Federal assistance under the Land and Water Conservation Fund Program, administered by the Bureau of Outdoor Recreation (BOR). Redding requested $459,900 in Federal funds for the acquisition of four pieces of property, totaling 325.9 acres, for open space purposes. The projects placed on "temporary hold" were: the Gibson Property, 45 acres; Greene Property, 60 acres; Falasca Property, 72.9 acres; and the Danks Property, 148 acres.

[37] Tina Calvert, Title VI Compliance Officer, memorandum to Assistant Director, Title VI Compliance, Title VI Division, Office of Equal Opportunity, USDI, "Preaward Review, Connecticut," Apr. 28, 1977.

The Connecticut State Commission on Human Rights and Opportunities is the State A-95 review agency for civil rights in Connecticut. The State commission routinely makes civil rights reviews for all Federal applications subject to the A-95 review. The findings in the Redding case were made through a routine review of Redding's grant application. Following the State commission's findings, in February 1976, a citizen of Redding filed a complaint with the Department of Justice, charging that the town of Redding had not resolved its conditions of noncompliance. The complainant alleged that through intense political pressure induced by the Governor and other elected representatives, the director of the Connecticut Commission on Human Rights and Opportunities was being coerced into retracting his original compliance findings. Such a retraction would clear the way for grants to Redding which, the complainant alleged, has not resolved its noncompliance. DOI, Office of Equal Opportunity, "Summary, Redding, Connecticut, Alleged Conditions of Noncompliance with Title VI of the 1964 Civil Rights Act" (undated).

Housing and Community Development Act of 1977.[38] Since many Federal programs fund similar community development activities, communities can apply for a desired community development activity with an agency other than HUD. The fact that alternative sources of funding for community development programs do not require compliance with fair housing may serve to weaken the fair housing provisions in the Housing and Community Development Act of 1977.

It is possible for municipalities to forego HUD's community development block grant assistance altogether rather than comply with its fair housing requirements. Indeed, communities that have been rejected from the community block grant program because of inadequate Housing Assistance Plans are presently able to obtain other Federal assistance for community development.[39]

In its effort to resolve the Redding, Connecticut, case, USDI was the only agency that, as of January 1978, was drafting guidelines on the issue of the relationship between Title VI and other civil rights statutes.[40] The Redding case also demonstrates USDI's uncertainty over its Title VIII authority. In April 1977, its Office of Equal Opportunity conducted a Title VI preaward review but failed to reach a conclusion because of its uncertainty over its Title VIII authority.[41] It instead sought advice on this issue from within the Department.

D. Potential Government-Wide Compliance Mechanisms

If there were a Government-wide standard for fair housing in communities receiving Federal assistance for development activities, it would be essential to have a centralized mechanism for gathering and disseminating information on the compliance status of those communities. Such a mechanism could minimize duplication of effort, reduce costs, and ensure that the Federal standard was being uniformly implemented. Two mechanisms exist which potentially could serve this function.

1. A-95 Review

The Office of Management and Budget (OMB) Circular A-95 review process[42] can serve to provide Title VI agencies with an evaluation of a community's compliance status with applicable civil rights laws. Pursuant to Part I of Circular A-95, public agencies charged with enforcing or furthering the objectives of State and local civil rights laws are provided an opportunity to review and comment on the civil rights aspects of the projects for which Federal assistance is sought. Following the receipt of comments from the clearinghouses, Federal agencies, in turn, are required to notify the State or area clearinghouse of any major actions on grant applications.[43] In cases where the clearinghouse has recommended against approval, or recommended approval pending stipulated changes, the funding agency must provide the clearinghouse an explanation of its actions.[44] Since comments from the clearinghouse are advisory only, responsibilty for approving or disapproving a grant application rests with the Federal agency.

The A-95 civil rights review can potentially serve as a Government-wide compliance mechanism in two ways. First, State and local civil rights agencies

[38] The implementation of this law is discussed in the chapter on the Department of Housing and Urban Development.

[39] For example, for fiscal year 1977, HUD rejected the application of the city of Livonia, Michigan, for the Community Development Block Grant program. Gordon McKay, Acting Deputy Director for Office of Field Operations and Monitoring, Office of Community Planning and Development, HUD, telephone interview, May 1, 1978. In fiscal year 1977, Livonia, however, received $4,840,000 in grant funds from the Economic Development Agency's Local Public Works Program, $1,056,000 from the Office of Revenue Sharing's revenue sharing entitlement funds, and $1,000 from the Tennessee Valley Authority fund. Community Services Administration, *Federal Outlays* (1977), State of Michigan, City Summaries, p. 29.

[40] Sharon White, Assistant Solicitor for Equal Opportunity Compliance, and Louis Milford, Attorney, Office of the Solicitor, Department of the Interior, interview, Jan. 20, 1978.

[41] Tina Calvert, Compliance Officer, Title VI Division, Office of Equal Opportunity, Department of the Interior, interview, Jan. 25, 1978.

[42] OMB Circular No. A-95, issued pursuant to the Intergovernmental Cooperation Act of 1968, furnishes guidance to Federal agencies for cooperation with State and local governments in the evaluation, review, and coordination of Federal and federally-assisted programs and projects. Part I provides an opportunity for State and local governments to comment on the proposed project's effect on the community and its relation to other programs. The three other parts are: Part II, "Direct Federal Development," which provides for consultation by Federal agencies with State and local governments on direct Federal development; Part III, "State Plans and Multisource Programs," which requires gubernatorial review of federally-required State plans and clearinghouse review of plans for activities being funded from several program sources; and Part IV, "Coordination of Planning in Multijurisdictional Areas," which promotes intergovermental coordination of federally-assisted planning at the State and local level. See also U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. VII, *To Preserve, Protect, and Defend the Constitution* (June 1977) (hereafter cited as *To Preserve, Protect, and Defend the Constitution)* for a more detailed discussion of the A-95 review.

[43] There are two types of A-95 clearinghouses: State and areawide. A State clearinghouse is a coordinating agency of the State government designated by the Governor or State law to participate in the A-95 review process. An areawide clearinghouse is a comprehensive planning agency. It is often a recipient of HUD assistance under Section 701 of the Housing Act of 1954, as amended (40 U.S.C. § 461 (1970)). Clearinghouses can be designated in two ways: by Governors for those in nonmetropolitan areas and by OMB, with the Governor's concurrence, for those in metropolitan areas. *To Preserve, Protect, and Defend the Constitution*, p. 116.

[44] OMB Circular No. A-95 (Revised), "Evaluation, Review and Coordination of Federal and Federally-Assisted Programs and Projects" (Jan. 13, 1976), Attachment A, Part I(b)(d), p. 2054.

could play an important role in alerting Federal agencies of possible noncompliance and potential civil rights problems of any applicant community. By virtue of their participation in the A-95 process, they should be aware of most Federal funds for which a community has applied. The process can be used to influence agencies to review indepth the compliance status of a municipality or town. Second, the process potentially encourages Federal agencies to ensure compliance with civil rights requirements before funding applications which clearinghouses have recommended not be funded for civil rights reasons. According to A-95 procedure, Federal agencies must provide an explanation to the A-95 agency for funding a community against its recommendation.

The Redding, Connecticut, case, for example, illustrates the effectiveness of the A-95 civil rights review in bringing attention to the status of a town's or municipality's compliance with civil rights statutes. It also demonstrates the responsible role played by Interior in responding to the A-95 comments.

However, the A-95 review has often not been effective. Local public civil rights agencies' participation in the review process is voluntary. If they do not choose to participate,[45] this precludes comments from other civil rights groups, since public civil rights organizations are the only designated bodies that can formally provide comment. In addition, OMB does not require clearinghouses to include civil rights comments as part of the A-95 reviews. Consequently, many clearinghouses have not always notified State and local civil rights agencies of project applications.[46]

Federal agencies have been accused of failing to comply with the "feedback requirement," which directs agencies to provide the clearinghouse an explanation for approving an application over the clearinghouse's objection.[47] Funding agencies have often failed to solicit A-95 review comments on civil rights. In 1975 EPA's Region V office, for example, received a complaint alleging that it failed to follow the A-95 review process properly in the review of an Oregon, Ohio, grant application. The complainant claimed that by failing to solicit comments regarding the civil rights aspects of the application, the application was not properly reviewed so as to ensure that the city of Oregon was furthering the national policy of fair housing and national and regional policies and plans relating to the dispersal of low-income housing.[48] Exclusionary zoning was the underlying issue. EPA found no violations and the case was dropped.[49]

2. HUD Reviews

If HUD operated an effective compliance program under Title VIII, it could be an ideal choice as a clearinghouse for comprehensive community fair housing compliance reviews for other community development agencies. HUD is mandated by Title VIII to be a leader in equal housing opportunity and to provide technical assistance to other executive agencies.

Because HUD itself funds the largest community development program[50] in the Federal Government, it could set standards for a uniform Federal response to ending housing discrimination. For example, if HUD conducted communitywide pattern and practice fair housing reviews,[51] agencies operating community development programs could rely on the results of those assessments. As of early 1978, HUD did not conduct such reviews.[52] However, in April 1978, the Secretary of Housing and Urban Develop-

[45] Public agencies often have neither the funds nor the staff to devote full participation in the A-95 process. Many feel that their activity is not useful because their comments appear to be ignored by the clearinghouses. Civil rights agencies also feel they are not provided sufficient data in the applications to make adequate civil rights assessments. *To Preserve, Protect, and Defend the Constitution*, p. 117.

[46] Ibid., pp. 117-18.

[47] Ibid., p. 121. See also Comptroller General of the United States, *Report to Congress: Improved Cooperation and Coordination Needed Among All Levels of Government—Office of Management and Budget Circular A-95* (Feb. 11, 1975), no. 42, pp. 39-41. In reference to HUD's area offices' compliance with this requirement, see U.S. Department of Housing and Urban Development, Community Planning and Development, Office of Evaluation, *Evaluation Series A-95 Project Notification and Review System: An Evaluation Related to Community Development Entitlement Block Grants* (November 1976), p. 13.

[48] Christopher L. Rissetto, Office of Regional Counsel, Region V, Environmental Protection Agency, memorandum to Robert B. Shaefer, Regional Counsel, Region V, and Alvin L. Alm, Assistant Administrator for Planning and Management, EPA, "Administrative Complaint, City of Oregon, Ohio, Construction Grant No. C39064801," Aug. 8, 1975. The complaint was submitted by the Advocates for Basic Legal Equality on June 27, 1975, jointly to Russell Train, Administrator, EPA, and Carla Hills, Secretary, Department of Housing and Urban Development.

[49] Edgar Jenkins, Acting Director, Office of Civil Rights, EPA, interview, Jan. 23, 1978.

[50] The Community Development Block Grant Program is described in the chapter on the Department of Housing and Urban Development.

[51] This Commission has recommended that in communitywide pattern and practice reviews HUD should examine the coverage of State and local fair housing laws, the types and quality of activity conducted by fair housing agencies, zoning ordinances, marketing activities of selected brokers and builders, mortgage financing practices of a sample of lenders, and data showing the racial and ethnic composition of neighborhoods throughout the area. See U.S. Commission on Civil Rights, *The Federal Civil Rights Effort—1974*, vol. II, *To Provide. . .For Fair Housing* (November 1975), p. 51 (hereafter cited as *To Provide. . .For Fair Housing*).

[52] Although HUD has engaged in communitywide pattern and practice

ment announced plans to establish "systematic discrimination units" to develop pattern and practice cases on a demonstration basis.[53]

Another possible HUD activity which could be valuable in gathering information on community compliance with fair housing laws is its reviews in connection with the GSA–HUD Memorandum of Understanding pursuant to Executive Order No. 11,512.[54] In this review, HUD determines the extent of discrimination in the sale and rental of housing. The review also notes those subareas that appear accessible to low- and moderate-income housing on a nondiscriminatory basis and those that do not. However, HUD's reports to GSA under the Executive order have been inadequate.[55]

III. Relocation Assistance

The Federal Government engages in numerous activities which result in the displacement of people from their residences. These activities include the acquisition of land for open space, the construction of highways or mass transit systems, and urban renewal. The Uniform Relocation Assistance and Real Property Acquisition Act of 1970[56] (hereafter cited as the Relocation Assistance Act) requires Federal agencies to pay displacees for moving and searching for a replacement dwelling and for the cost of replacement housing for homeowners and tenants.[57] The act also requires Federal agencies to help displacees find comparable replacement housing by setting up a relocation assistance advisory program to:

- Determine the need, if any, of displaced persons for relocation assistance;
- Provide current and continuing information on the availability, prices, and rentals, of comparable decent, safe, and sanitary sales and rental housing;
- Assure that, within a reasonable period of time, prior to displacement there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings. . .equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment;
- Supply information concerning Federal and State housing programs, disaster loan programs, and other Federal or State programs offering assistance to displaced persons; and
- Provide other advisory services to displaced persons in order to minimize hardships to such persons in adjusting to relocation.[58]

A. Relocation Agencies

All Federal agencies engaged in the acquisition of real property or the displacement of persons, farms, or businesses have responsibility under the Relocation Assistance Act. Among the agencies significantly affected by this act are: the Departments of Agriculture; Commerce; Energy; Defense (the Army Corps of Engineers); Health, Education, and Welfare; Housing and Urban Development; the Interior; Justice; Labor; Transportation; and the Treasury; and the Appalachian Regional Commission; Environmental Protection Agency; General Services Administration; National Aeronautics and Space Administration; Nuclear Regulatory Commission; Pennsylvania Avenue Development Corporation; Tennessee Valley Authority; U.S. Postal Service; and the Veterans Administration.

In 1972 the Office of Management and Budget issued implementing guidelines under Circular A-103 for the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. These guidelines, currently administered by GSA,[59] apply to all Federal agencies and federally-assisted pro-

reviews in the past, it feels that it has no authority to conduct them unless there is prior evidence that a community is discriminating in housing. See discussion of this point in the chapter on the Department of Housing and Urban Development.

[53] Henry A. Hubschman, Executive Assistant to the Secretary, U.S. Department of Housing and Urban Development, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 17, 1978.

[54] Exec. Order No. 11,512, 3 C.F.R. 898 (1966–1970 Compilation). Exec. Order No. 11,512 concerns the planning, acquisition, and management of Federal space.

[55] HUD reports under Exec. Order No. 11,512 are discussed in the chapter on the General Services Administration.

[56] 42 U.S.C. §§ 1415, 2473, 3307, 4601–4602, 4621–4638, 4651–4655 (1970); 49 U.S.C. § 1606 (1970). The act also covers farms and businesses that are displaced as a result of a Federal activity or program.

[57] 42 U.S.C. §§ 4622, 4623, 4624 (1970).

[58] 42 U.S.C. § 4625(c)(i)–(4), (6) (1970). Displacing agencies are also required to coordinate their relocation activities with other Federal, State, or local governmental projects in the surrounding areas. Other Federal agencies are required to cooperate with the displacing agency to assure that displaced persons receive the maximum assistance available to them.

[59] In 1974 Circular A-103 was rescinded and transferred to GSA as Federal Management Circular 78–4. GSA codified the circular in 34 C.F.R. § 233. In 1977 GSA revised its regulations and redesignated them to be in 41 C.F.R. § 101–6 *et seq.* 42 Fed. Reg. 14,097 (1977). In August 1978 this Commission sent the General Services Administration draft sections of its report on fair housing. GSA provided comments on the chapter which focused on the General Services Administration, but made no comments on this chapter.

grams involved in the acquisition of property or in the displacement of businesses or persons.[60] The GSA guidelines require each such agency to issue regulations pursuant to the Relocation Assistance Act.[61]

Although the Relocation Assistance Act itself contains no explicit civil rights provisions, the GSA guidelines require agencies to take into account Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968[62] when they issue their own regulations. The guidelines also state that a "comparable replacement dwelling" must be "open to all persons regardless of race, color, religion, or national origin, consistent with the requirement of the Civil Rights Act of 1968."[63] The guidelines further require Federal agencies, or Federal-aid recipients acting as displacing agencies,[64] to assure that a supply of adequate replacement housing is available on a fair housing basis prior to displacement.[65]

The inclusion of civil rights provisions in the GSA guidelines serves to ensure that, as a minimum, each agency with relocation assistance responsibility recognizes its Title VIII responsibility. However, of the agencies surveyed, only the Departments of Commerce; Health, Education, and Welfare; Labor; and Transportation; and the EPA; Pennsylvania Avenue Development Corporation; TVA; and the U.S. Postal Service reported that they had such responsibility.[66]

Moreover, the GSA guidelines provide insufficient guidance on how agencies should implement civil rights requirements. Although the GSA guidelines provide detailed standards for "decent, safe, and sanitary housing,"[67] they provide no similar description of "fair housing" under Title VIII and do not give instructions on how to determine whether replacement housing is drawn from an open housing market. The guidelines, for example, could instruct agencies to check with HUD and local fair housing groups, send testers into the local housing market, check for integration by visually reviewing the building or area, and obtain an assurance from the seller, real estate agent, or landlord. Without first determining whether the housing market, in fact, operates on a nondiscriminatory basis, the displacing agency would not be able to tell if comparable replacement housing is fair housing, and as a result, it would unknowingly perpetuate housing discrimination. For example, a real estate agent or a landlord's willingness to sell or rent housing to

[60] 42 Fed. Reg. 14,097 (1977) to be codified in 41 C.F.R. § 101–6.1

[61] 42 Fed. Reg. 14,097 (1977) to be codified in 41 C.F.R. § 101–6.101–4. The purpose of the guidelines is to assist Federal agencies in developing regulations and procedures to implement the Relocation Assistance Act to ensure uniform, fair, and equitable policies for the acquisition of real property and the treatment of displaced persons. The guidelines were prepared by the Relocation Assistance Implementation Committee, a seven-member body created by Presidential memorandum of Jan. 4, 1971. The agencies represented on the Committee are: the Departments of Agriculture; Defense; Health, Education, and Welfare; Housing and Urban Development; the Interior; Justice; and Transportation; and the General Services Administration. The U.S. Postal Service also participates in its activities.

[62] 42 Fed. Reg. 14,097 (1977) to be codified in 41 C.F.R. § 101–6.101–3.

[63] 42 Fed. Reg. 14,097 (1977) to be codified in 41 C.F.R. § 101–6.102–2. "Comparable replacement dwelling" is defined as one that is decent, safe, and sanitary, and:

—Functionally equivalent and substantially the same as the acquired dwelling, but not excluding newly constructed housing;
—Adequate in size to meet the needs of the displaced family or individual;
—Located in an area not generally less desirable than the one in which the acquired dwelling is located with respect to:
(1) Neighborhood conditions, including but not limited to municipal services and other environmental factors;
(2) Public utilities; and
(3) Public and commercial facilities;
—Reasonably accessible to the displaced person's place of employment or potential place of employment.
—Within the financial means of the displaced family or individual; and
—Available on the market to the displaced person.

Under the Relocation Assistance Act, "a comparable replacement dwelling" serves as a standard by which referrals for replacement housing are made. It is also used for computing the replacement housing payment. 42 Fed. Reg. 14,097 (1977) to be codified in 41 C.F.R. § 101–6.106–2.

[64] A displacing agency is a Federal agency or a Federal-aid recipient whose program or activity results in the displacement of residences, businesses, or farms.

[65] 42 Fed. Reg. 14,097 (1977) to be codified in 41 C.F.R. § 101–6.103–1(a).

[66] The Departments of Commerce; Health, Education, and Welfare; Labor; and Transportation; and the EPA; Pennsylvania Avenue Development Corporation; TVA; and U.S. Postal Service responses to U.S. Commission on Civil Rights Fair Housing Questionnaire.

[67] 42 Fed. Reg. 14,097 (1977) to be codified in 41 C.F.R. § 101–6.102–3. A decent, safe, and sanitary dwelling is one which is found to be in sound, clean and weather-tight condition, and which meets local housing codes. The following criteria should be used in determining if a dwelling unit is decent, safe, and sanitary. Adjustments may be made only in the cases of unusual circumstances or in unique geographic areas, as determined by the head of the Federal agency. (a) Housekeeping unit. A housekeeping unit must include a kitchen with fully usable sink; a cooking stove, or connections for same; a separate complete bathroom; hot and cold running water in both the bathroom and kitchen; and adequate and safe wiring system for lighting and other electrical services; and heating as required by climatic conditions and local codes. (b)Nonhousekeeping unit. A nonhousekeeping unit is one which meets local code standards for boarding houses, hotels, or other congregate living. If local codes do not include requirements relating to space and sanitary facilities, standards will be subject to the approval of the head of the Federal agency. (c)Occupancy standards. Occupancy standards for replacement housing shall comply with Federal agency approved occupancy requirements or shall comply with local codes. (d)Absence or inadequacy of local standards. In those instances in which there is no local housing code, a local housing code does not contain certain minimum standards, or the standards are inadequate, the head of the Federal agency may establish the standards.

minorities does not necessarily indicate fair housing. A dual housing market,[68] which is difficult to detect on the surface, may be in operation.

By failing to require an independent assessment of the housing market, the present GSA guidelines on Title VIII may also be confusing. Since fair housing is presently part of the definition of "comparable replacement dwelling," it can mislead agencies into believing that because comparable replacement housing is available, it is necessarily "fair housing—open to all persons regardless of race, color, religion, sex, or national origin and consistent with the requirement of Title VIII of the Civil Rights Act of 1968."[69]

B. An Example—The Federal Highway Administration

Since GSA guidelines provide inadequate guidance on Title VIII, implementing agencies are left with the burden of defining Title VIII for themselves. Of the agencies surveyed in this chapter, the Department of Transportation has the largest relocation assistance program. Within DOT, the Federal Highway Administration (FHWA) makes up the largest portion of this program.[70] FHWA has promulgated detailed regulations and program guidelines pursuant to the Relocation Assistance Act and the GSA guidelines.[71] FHWA follows the guidance GSA provides on Title VIII.[72] It has also instructed State highway agencies to:

- Take affirmative action to insure that replacement housing resources used are, in fact, open to all races and sexes without discrimination;
- Establish procedures for processing fair housing discrimination complaints;
- Inform relocatees of their fair housing early in the process of the relocation assistance; and
- To the extent possible, assist relocatees in ensuring against discriminatory practices in the purchase and rental of residential units on the basis of race, color, religion, sex, or national origin.[73]

Nonetheless, FHWA's regulations and guidelines reflect the deficiencies found in the GSA implementing guidelines. Like GSA's guidelines, FHWA makes no substantive provisions for ensuring that comparable replacement housing is, in fact, open housing within the meaning of Title VIII. For example, FHWA's regulations do not require the use of review procedures for ensuring that the housing market is nondiscriminatory. Although the program guidelines instruct States "to take affirmative action" for fair housing, they do not specify what the affirmative action should be. The vagueness of such a provision makes effective implementation of Title VIII difficult.

The GSA guidelines also do not provide adequate instruction for handling discrimination which restricts the availability of replacement housing.[74] In response to such a situation, FHWA interprets that "last resort housing" can be used if the State agency determines a need based on a preliminary housing study. This study must demonstrate "that the project cannot proceed to actual construction because comparable sale or rental housing is not reasonably anticipated to be available and cannot be made available."[75] According to FHWA's regulations, the States must do a preliminary housing study:

> . . .whenever, during the planning, development, or execution of a Federal or federally assisted project, it appears that a sufficient supply of comparable decent, safe, and sanitary replacement housing may not be available to satisfy the requirements of this part [740.1 *et seq.*] *or that such housing is not available on a nondiscriminatory or fair housing basis. . . .*[76] [Emphasis added]

FHWA has gone beyond the GSA guidelines by adding fair housing considerations to its regulation on "last resort housing." However, a literal reading

[68] A dual housing market, one for white and the other for minorities, results from the practice of "steering" and discrimination against minority brokers, who are often not given the same access to listings as white brokers.

[69] 42 Fed. Reg. 14,097 (1977) to be codified in 41 C.F.R. § 101-6.102-2.

[70] George Staczko, Leasing Division, Office of Space Planning and Management, Public Buildings Service, General Services Administration, telephone interview, July 19, 1978. The primary program of the Federal Highway Administration is to provide funds to State highway agencies for highway construction, which also invariably results in displacement of homes or businesses. The State highway agency thus becomes a displacing agency.

[71] FHWA must also comply with the Department of Transportation's regulations for the Relocation Assistance Act. 49 C.F.R. § 25.1 *et seq.* (1977).

[72] 23 C.F.R. § 740.1 *et seq.* (1977).

[73] U.S. Department of Transportation, Federal-Aid Highway Program Manual (Nov. 4, 1976), vol. 7, chap. 5, p. 14.

[74] The Relocation Assistance Act provides relief for Federal agencies in situations where replacement housing cannot be found. 42 U.S.C. § 4626 (1977). GSA regulations provide that after the head of an agency has made a determination that such housing is not available, he or she can take action to rehabilitate or build replacement housing, which is referred to as "last resort housing." 42 Fed. Reg. 14,097 (1977) to be codified in 41 C.F.R. § 101-6.103.2.

[75] 23 C.F.R. § 740.117 (1977).

[76] *Id.*

of the emphasized portion of FHWA's regulations for last resort housing suggests that last resort housing can be built in instances in which, were it not for housing discrimination, a supply of replacement housing would be available. Instead of requiring State highway agencies to take action to combat the discrimination, FHWA's regulations permit them to ignore the discrimination and instead build last resort housing for displacees.

The Department of Transportation recognizes that the language in its regulation can be misleading and wrote to this Commission that it is taking steps to correct it. The Department stated:

> FHWA recognizes that the language may be misleading and is taking steps to correct it. FHWA's policy is that last resort housing cannot be built unless it is open and fair housing. Also, no project. . .can be constructed unless the last resort housing [authorized] is built. . . . The last resort policy is a viable one, in addition to the remedies available through the Department of Housing and Urban Development and the Department of Justice.[77]

FHWA has made efforts to include questions on Title VIII in its Title VI compliance reviews of State highway agencies.[78] These questions, for the most part, ask whether fair housing requirements are discussed during FHWA's public hearings.[79]

IV. Equal Employment Opportunity and Housing

The principle of equal employment opportunity necessitates that persons not be denied employment because of race, color, national origin, religion, or sex. If discrimination on any of these bases prevents people from finding suitable housing in the vicinity of an employer's facilities, this can effectively exclude them from obtaining employment at the facilities. In the Commission's view, equal employment opportunity requires employers to take action to overcome or compensate for any effects housing discrimination has on the composition of their work forces.

Employers can ensure that the sites they choose for relocation, new installations, or offices do not effectively exclude minorities from their work forces by choosing sites in close proximity or with convenient transportation to an adequate supply of low- and moderate-income and nondiscriminatory housing.[80] Employers can also participate in the construction or financing of housing to ensure that suitable housing is available on a nondiscriminatory basis. In addition, employers can combat the effect of housing discrimination on the composition of their work forces by establishing a housing locator service, listing dwellings that are available on a nondiscriminatory basis, and include low-income housing. Employers can also provide employees with information on how to file complaints of discrimination in housing or mortgage finance with the appropriate Federal, State, or local agency.

A. Private Employment

Both the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor share major responsibilities for eradicating employment discrimination in the private sector.[81] EEOC is the lead agency for enforcing Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972.[82] OFCCP has the lead responsibility for enforcing Executive Order No. 11,246, as amended by Executive Order 11,375.[83]

EEOC recognizes the relationship between fair housing and equal employment opportunity. According to EEOC:

> Discrimination in housing limits employment opportunity. When major employers move from the central city to suburban areas, there is

[77] Ellen Feingold, Director, Office of Civil Rights, Department of Transportation, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 23, 1978.

[78] On Dec. 20, 1976, the Federal Highway Administration made a number of changes to its Civil Rights Equal Opportunity Manual. One of the changes was to include Title VIII of the Fair Housing Act of 1968 as part of its civil rights authorities. In FHWA's Title VI program implementation and review procedures, Title VIII consideration has been added to the list of questions for conducting Title VI compliance reviews. DOT, FHWA, Federal-Aid Highway Program Manual, Transmittal 233, Dec. 20, 1976.

[79] Ibid. Although such questions are helpful, FHWA should also monitor whether State agencies have adequate procedures for assuring that replacement housing is fair housing.

[80] The relationship between the provision of low- and moderate-income housing and equal employment opportunity is discussed in the GSA chapter.

[81] See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, vol. V, *To Eliminate Employment Discrimination* (July 1975) and *The Federal Civil Rights Enforcement Effort—1977, To Eliminate Employment Discrimination: A Sequel* (December 1977) for detailed discussion of the activities of EEOC and OFCCP.

[82] 42 U.S.C. 2000e (Supp. V 1975).

[83] Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965 Compilation), as amended by Exec. Order No. 11,375, 3 C.F.R. 684 (1966–1970 Compilation) at 684. Part II of Exec. Order No. 11,246 prohibits discrimination in employment on the basis of race, creed, color, or national origin among Federal contractors and subcontractors, and requires them to take affirmative action to ensure that equal opportunity is provided. Exec. Order No. 11,375 added sex as a prohibited basis of discrimination.

> a risk that the segregated residential patterns in predominantly white suburbia will be reflected in the employer's workforce. In turn, discrimination in employment, by limiting income, limits housing opportunities.[84]

EEOC takes the position that, where it can be shown that a plant relocation is undertaken for the purpose of limiting minority opportunities, such action would constitute a violation of Title VII.[85] Moreover, EEOC encourages employers to take action to eliminate the adverse affect that housing discrimination may have on their employment practices. For example, EEOC provides the following advice to employers in its publication *Affirmative Action and Equal Employment: A Guidebook for Employers:*

> Many companies have moved away from the areas where most minorities live. Employment opportunities are often in areas where racial or economic restrictions prevent minorities and lower-paid employees from living within reasonable distance.
>
> Consider working, as some companies already are doing, to get more housing in your labor area that is racially open and within the financial means of lower-paid employees. Without such housing, it will continue to be difficult to provide equal employment opportunity for many.[86]

EEOC also makes provisions in its conciliation agreements with employers for eliminating the adverse affect of housing problems on employment opportunities.[87]

In addition, OFCCP regulations recognize the relationship between housing and employment discrimination. As OFCCP observes:

> Section 60–2.13(a) states that contractors should take special corrective action where the analysis for their affirmative action program shows a lack of access to suitable housing or transportation for minorities; and Section 60–2.24(h) states that contractors are to encourage child care, housing, and transportation programs appropriately designed to improve the employment opportunities for minorities and women.[88]

However, OFCCP has remained silent on the issue of contractor relocations concerning moves from a city to a suburb where fewer housing opportunities for minorities may exist. Indeed, it has been alleged that OFCCP permits contractors who relocate from the inner city to the suburbs to reflect the impact of suburban housing discrimination in setting affirmative action hiring goals by allowing employers to adopt new lower hiring goals if they move to an area where fewer minorities reside.[89]

On December 15, 1977, Suburban Action Institute, a New York-based, private, nonprofit civil rights group, challenged OFCCP's stand, and petitioned the U.S. Department of Labor for a ruling on OFCCP's interpretation of Executive Order 11,246 that contract compliance obligations do not extend to corporate relocations. The petition specifically asked the Department of Labor to determine whether Union Carbide was in violation of Executive Order 11,246 because of its corporate move from New York City to Danbury, Connecticut.[90]

In response to Suburban Action Institute's petition, OFCCP will be issuing proposed regulations that will address the issues raised.[91] OFCCP stated:

> While OFCCP cannot require that contractors remain within particular geographic areas, we can take some additional steps to ensure that contractors make the availability of fair housing a consideration in corporate relocations. The regulations being drafted establish specific good faith efforts contractors will have to make in corporate relocations to ensure that all employ-

[84] *Federal Government Fair Housing 1976*, p. 19.

[85] EEOC reported to HUD that it took this position in an amicus curiae brief it submitted for the plaintiff in Bell v. Automobile Club of Michigan. *The Federal Government Fair Housing 1976*, p. 21. This case is referenced in 7 EDP 9213.

[86] U.S., Equal Employment Opportunity Commission, *Affirmative Action and Equal Employment, A Guidebook for Employers* vol. I (January 1974), p. 62 (hereafter cited as *Affirmative Action and Equal Employment*).

[87] For example, EEOC has reported to HUD that on Mar. 8, 1974, it announced the signing of a conciliation agreement with Jersey Central Power and Light Co. The agreement included a provision that funds be allocated by the company to secure transportation for minorities in high density areas to travel to the company's facilities, which in most instances were removed from other modes of public transportation. *The Federal Government Fair Housing 1976*, p. 21.

[88] OFCCP also commented:

> Other sections, such as those calling on contractors to work with minorities' and women's organizations in recruitment indirectly address community problems such as housing. OFCCP evaluates contractors' efforts under these sections in determining whether good faith efforts have been made to practice affirmative action in employment. Weldon J. Rougeau, Director, Office of Contract Compliance Programs, Department of Labor, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 9, 1978 (hereafter cited as Rougeau letter).

[89] Suburban Action Institute, Petition to the U.S. Department of Labor for a Ruling that Union Carbide is in Violation of Federal Contract Compliance Requirements Pursuant to Exec. Order No. 11,246, Dec. 15, 1977.

[90] Ibid.

[91] Richard Devine, Assistant Director, Office of Contract Compliance Programs, Department of Labor, telephone interview, May 15, 1978. The proposed regulations were scheduled to be issued in mid-June 1978.

ees have a realistic opportunity to retain their jobs. Among the good faith efforts will be considering the availability of fair housing for women and minorities in planning corporate moves and working cooperatively with community groups and local governments to obtain equal access to housing for all segments of the contractor's workforce. Publication of these regulations is planned to coordinate with other changes made necessary by the consolidation of the contract compliance program.[92]

B. Federal Employment

The Federal Government recognizes that housing discrimination affects employment opportunities. Executive Order 11,512 assigns responsibility to both GSA and heads of executive agencies to consider the availability of adequate low- and moderate-income housing in the acquisition or assignment of Federal space and to consider the effect that a selection of a site for Federal facilities will have on improving social and economic conditions in an area.[93]

One of the objectives of HUD's Federal Equal Housing Opportunity Council is to "plan facility locations so that housing options for employees, particularly minorities and women, are not hampered."[94] According to the Council:

> Whenever an agency relocates all or part of its facilities, changes in the housing needs of the employees caused by the relocation must be considered and responded to by the agency. This includes (1) adequate low- and moderate-income housing in a reasonable distance from the new site, available to employees on a nondiscriminatory basis, and/or (2) adequate public transportation between residences and the work site, or the provision of adequate transportation by the agency.[95]

Another objective of the Federal Equal Housing Opportunity Council is to set up housing locator services for all its 52 member agencies.[96] According to the Council, 24 of the Council members have, to some extent, set up such services.[97] The Tennessee Valley Authority, for example, produced the *Knoxville—Knox Homeseekers Guide* for TVA employees and other county residents. The guide provides information on sale and rental housing in the county, transportation routes, and child care service information. The Department of State and the U.S. Information Agency use the housing referral service administered by the Association of Foreign Service Women. This service accepts and posts housing notices on bulletin boards throughout the agency. The service requires owners to certify in writing that listings are available on a fair housing basis.[98]

Nonetheless, many Federal agencies have not adequately recognized that fair housing assistance may be necessary to ensure Federal equal employment opportunity. More than half the Council agencies provide no fair housing services to employees, including the Departments of Justice and the Treasury and the Veterans Administration.[99] Admittedly, some of the agencies without housing locator services are small, such as the Farm Credit Administration and this Commission,[100] and they may lack the resources for an effective locator service. However, the Council could assist such agencies to establish coordinated, metropolitanwide, interagency, housing locator services for their Washington headquarters and various field offices.

Another indication that agencies have not adequately assumed fair housing responsiblities with regard to their employees and potential employees is that, in response to this Commission's fair housing questionnaire, only four agencies listed Executive

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[92] Rougeau letter.

[93] Exec. Order No. 11,512, 3 C.F.R. 898 (1966–1970 Compilation), Section 2.

[94] *The Federal Government Fair Housing 1976*, p. 1.

[95] Ibid., p. 88.

[96] Other internal agency equal housing efforts have included appointments of agency housing officers, establishment of a fair housing complaint service, and development of liaisons with community groups and other Federal and local government units in promoting fair housing in the community.

[97] The 24 Council members that have housing locator services are: the Departments of Agriculture; Commerce; Defense; Energy; Health, Education, and Welfare; Housing and Urban Development; the Interior; Labor; State; and Transportation; ACTION; Central Intelligence Agency; Civil Service Commission; Environmental Protection Agency; Federal Communications Commission; Federal Home Loan Bank Board; Federal Maritime Commission; Federal Mediation and Conciliation Service; Federal Trade Commission; Indian Claims Commission; Interstate Commerce Commission; National Labor Relations Board; Tennessee Valley Authority; and U.S. Information Agency. The Council recommends that the service be in a well advertised, easily accessible location where employees can receive information on housing vacancies, information on fair housing rights, and housing discrimination counseling or referral to the appropriate enforcement agency. *Federal Government Fair Housing 1976*, p. 88.

[98] U.S., Department of State and U.S. Information Agency, responses to U.S. Commission on Civil Rights Fair Housing Questionnaire.

[99] The Departments of Justice and the Treasury and the Veterans Administration are examples of agencies with large numbers of employees. As of May 31, 1977, Justice employed 51,667 permanent, full-time persons; Treasury, 118,024; and the Veterans Administration, 190,996.

[100] As of May 31, 1977, FCA employed 4,270 permanent, full-time persons; the U.S. Commission on Civil Rights, 287.

Order 11,512 as one of the equal housing opportunity authorities for which they had responsibility.[101] Moreover, of those agencies reporting recent moves of more than 50 miles and involving 100 or more employees, none reported responsibility under Executive Order 11,512 or said that they considered the presence of low- and moderate-income housing and nondiscriminatory housing in selecting their new site.[102]

V. Surplus Property

Federal surplus real property[103] offers a potential resource for helping some localities meet their needs for low- and moderate-income housing. In 1968 Congress set a 10-year goal of 6 million federally-subsidized units for the poor. As of mid-1978, the Federal Government had met only 2.7 million of this goal, leaving a need for 3.3 million to be built or rehabilitated. The Center for National Policy Review[104] reported cases where Federal surplus real property could meet the need for low- and moderate-income housing in specific localities. For example, the center found that:

- In Laredo, Texas, the construction of the new international bridge between Laredo and Mexico forced the relocation of 340 low- and moderate-income families, which resulted in an urgent housing need. The Laredo Air Force Base, constructed in 1969 with 405 housing units, had 283 acres available as surplus property.
- In Roswell, New Mexico, 785 housing units on the former Walker Air Base in Charles County, Roswell, were available to meet the critical housing needs of Mexican American migrant workers living in substandard housing.
- At the Naval Air Station in Albany, Georgia, 470 units and 222 units at the Glynco Naval Air Station in Brunswick, Georgia, were available to meet acute housing shortages in the area for low- and moderate-income families.[105]

Despite the potential of Federal surplus real property, less than 1 percent of the Federal real property that becomes surplus is generally used for low- and moderate-income housing.[106]

Section 414 of the Housing and Urban Development Act of 1969, as amended, gives HUD the authority to sell or lease surplus Federal property to non-Federal applicants at its "fair value for use" for low- and moderate-income housing.[107] There are several provisions within this legislation that have hampered the program's effectiveness:

- First, the statute requires HUD to inform the local government of its intention to sell or lease surplus property to a nonpublic body for low- and moderate-income housing and allows the local government the opportunity to veto HUD's action.[108] The effect of this provision is to permit local communities to continue to discriminate against low- and moderate-income persons by refusing low- and moderate-income housing.[109]
- Second, HUD is required to sell or lease a surplus property at its "fair value for use."[110] This, in effect, may bar many transferees, especially local housing authorities, from acquiring the property because they lack the funds to pay for it. While HEW or Interior can sell or lease property

[101] Exec. Order No. 11,512 applies to the heads of executive agencies. The coverage of that order is discussed in the chapter in this report on GSA. The four agencies are: the Department of Labor, the National Aeronautics and Space Administration, the National Credit Union Administration, and the Nuclear Regulatory Commission.

[102] The survey results showed that among the 58 agencies, there were 3 agencies supporting moves of more than 50 miles and involving 100 or more employees in the past 5 years. The Federal Maritime Commission reported four such moves in the past 5 years; the Coast Guard within the Department of Transportation, five moves; the Department of the Treasury, one move.

[103] As of Sept. 30, 1977, the GSA Inventory showed an estimate of 79,500 acres of surplus property on hand. Norman Miller, Special Programs, Office of Real Property, Public Buildings Service, General Services Administration, telephone interview, Feb. 22, 1978. Federal surplus real property refers to any excess property which, in the determination of the General Services Administrator, is not required for the needs and the discharge of the responsibilities of all Federal agencies. "Excess property" is any property under the control of a Federal agency which the head of the agency determines is no longer required for the needs and the discharge of the responsibilities of the agency. When an agency no longer needs a piece of property, other agencies are given the option to utilize any excess property. If no Federal agency needs the excess property, it is then declared surplus and becomes eligible for transfer. The Federal Property and Administration Services Act of 1949 as amended (40 U.S.C. § 484 (1970)) governs this process.

[104] The Center for National Policy Review is a nonprofit organization for research and review of national policies with urban and racial implications. It is affiliated with the Catholic University of America School of Law, Washington, D.C. The center has frequently informed GSA and HUD of documented instances where there is a need for low- and moderate-income housing in an area and the availability of Federal surplus real property in the area that could be used for that purpose.

[105] Glenda Sloane, Supervisory Attorney, Center for National Policy Review, Catholic University of America School of Law, letter to Carla Hills, Secretary, HUD, Aug. 10, 1976. In this letter, the center criticized HUD for failing to pursue these opportunities.

[106] David C. Nimmer, New Communities Program Specialist, and Sheila Jones, Housing Program Specialist, Division of Surplus Property, New Communities Administration, Department of Housing and Urban Development, interview, Jan. 18, 1977.

[107] 40 U.S.C. § 484b (1970).

[108] *Id.*

[109] The Center for National Policy Review, Catholic University of America School of Law, *Shelter and Surplus Land: A Report on the Potential of Federal Surplus Property* (June 1973), p. 39 (hereafter cited as *Shelter and Surplus Property).*

[110] 40 U.S.C. § 484b (1970). HUD must sell the property at its "fair value for use," the dollar value of the property as a site for low- and moderate-income housing development.

for education or parks at a "public benefit discount" of up to 100 percent, HUD must sell its property for a substantially higher price.[111]

A. Department of Housing and Urban Development

Although statutory provisions may limit the effectiveness of securing Federal surplus property for the use of low- and moderate-income housing, HUD nonetheless can do much to facilitate the process of securing Federal surplus property for this use. Since GSA first informs Federal agencies of the availability of excess property,[112] HUD has the opportunity to review the property's feasibility for housing and to inform local groups and eligible applicants of the potential of the property for low- and moderate-income housing. Since HUD should be aware of the need of any community for low- and moderate-income housing through the community development block grant's Housing Assistance Plan,[113] HUD is in a particularly good position to suggest to appropriate local governing bodies that Federal surplus property is available to meet a community's need for low- and moderate-income housing. HUD then can inform GSA of any local applicants who have expressed an interest in obtaining the property for low- and moderate-income housing.

Since 1969, however, HUD has consummated only five transfers of real property, amounting to a total of 176.43 acres and approximately 1,630 to 2,130 housing units for low- and moderate-income families.[114] The Center for National Policy Review reports that HUD has taken a passive role in securing Federal surplus real property for the use of low- and moderate-income housing. The center reported that structural and administrative shortcomings hampered HUD's effectiveness in administering its surplus property role. These shortcomings include inadequate staffing and failure to investigate adequately excess property notices. HUD failed to exercise leadership, the center found, in exploiting the potential of surplus property for low- and moderate-income housing.[115]

B. Other Agencies

Other agencies could also play a part in furthering the use of Federal surplus property for low- and moderate-income housing by simply informing HUD as soon as they are aware of property which may become available and which could be suitable for low-income housing. Assuming that a Federal agency knows its own property best, it is in a good position to inform HUD of its potential for housing. This would inform HUD in advance of the properties available and allow HUD to inform local applicants or groups who can then find interested applicants. Such agency action would be especially helpful to HUD, since GSA allows eligible applicants only 20 days to indicate an interest in the property once it has been declared surplus. However, no Federal agency surveyed by this Commission's fair housing questionnaire had a policy or procedure to facilitate the use of surplus property for low- and moderate-income housing.

As overseer for the disposal of Federal surplus real property, the GSA Administrator is permitted wide discretion on deciding the best proposed use for a particular piece of property. Where there are competing requests for different uses, GSA is required to give them equal consideration since the Federal Property and Administrative Services Act does not assign priorities among the statutory agencies. GSA, therefore, is in a position to evaluate the potential uses and select the one that will best serve the community. In many localities, fulfilling the need for low- and moderate-income housing is an urgent local need. The Center for National Policy Review, however, found that GSA's determination of whether HUD, HEW, or Interior receives the transfer, "is based upon undisclosed representations made to GSA by [the] agencies, and is made without any indication of reasons."[116]

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[111] *Shelter and Surplus Property*, pp. 41–42.

[112] Federal agencies are the first parties to receive notices of Government excess properties. In reality, most excess properties later are declared surplus. When surplus properties become available, GSA, the agency that oversees the disposal of Federal surplus property, is required to provide notice of surplus property to all eligible State and local governing bodies. If GSA receives letters of interest from eligible agencies within 20 days, it promptly reviews the statements of intention and determines a time period to allow the agency to develop and submit a formal application. The eligible agency's application is sent to the Federal agency having statutory authority over the proposed use for the property. If the proposed use is for low- and moderate-income housing, GSA and HUD coordinate on the review and determination of the application. If GSA receives no notices of intention, it can dispose of the surplus property by public sale at its fair market value.

[113] The Housing Assistance Plan is discussed in the chapter on the Department of Housing and Urban Development.

[114] HUD document describing five transfers of Real Property for Low- or Moderate-Income Housing, Surplus Property Division, New Communities Administration (August 1977).

[115] *Shelter and Surplus Property*, pp. 47–48.

[116] Ibid., p. 45. In its report, the center recommends:

> . . .that either the Housing and Urban Development Act or the Federal Property and Administrative Services Act be amended to

Prior to 1977, the White House had an active role in influencing the uses of Federal surplus property. The Federal Property Council, part of the Executive Office of the President, helped to transfer hundreds of acres of surplus land for parks under the Nixon administration's "Legacy of Parks" program. There has been no comparable leadership with regard to using surplus property for low-income housing.[117] On December 15, 1977, President Carter abolished the Federal Property Council in conjunction with a reorganization of his Executive office.[118]

VI. Mortgage Lending

A. Government Oversight of Mortgage Lenders

The Government engages in a number of oversight activities related to mortgage lending. As a regulator of financial institutions, it enforces applicable laws, including fair housing laws, and also sets standards for mortgage lenders who conduct business with the Government. In addition, as a guarantor or insurer of certain loans made by financial institutions, the Federal Government has both the authority and the responsibility to ensure that mortgage lenders with whom it does business do not violate Title VIII of the Civil Rights Act of 1968[119] and the Equal Credit Opportunity Act.[120]

1. National Credit Union Administration (NCUA) and Farm Credit Administration (FCA)

In addition to the four Federal financial regulatory agencies that oversee most of this Nation's banks and savings and loan associations,[121] there are two other Federal agencies that regulate financial institutions which make mortgages. The National Credit Union Administration (NCUA) charters, insures, supervises, and examines Federal credit unions,[122] which provide their members low-cost credit and a depository for their savings. Any group of individuals who share a common bond of occupation or association, or who are from a well-defined neighborhood, community, or rural district are eligible to form Federal credit unions. Federal credit unions thus benefit a broad range of citizens throughout the country. Federal credit unions offer loans for a variety of purposes, including home improvement and repair and home mortgages. Until recent years Federal credit unions could make home mortgages with maturities of up to only 10 years.[123] In 1977 the Federal Credit Union Act was amended to authorize Federal credit unions to make residential real estate loans with maturities of up to 30 years.[124] NCUA regulations permitting such loans became effective in May 1978.[125] By extending the maturation of real estate loans, the new legislation places Federal credit unions competitively into the home mortgage market.

The Farm Credit Administration (FCA) supervises, examines, and coordinates the financial institutions comprising the Farm Credit System. These institutions include Federal land banks and land bank associations, Federal intermediate credit banks and production credit associations, and banks for cooperatives. These farm credit institutions are geared to meet the financial needs of farmers, farm-related businesses, and other rural persons. Among the purposes for which they provide loans are rural homeownership and repair.

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require that GSA hold an administrative hearing and render a decision based upon the hearing record in determining whether or not to transfer surplus land to any agency requesting transfer, and where more than one agency files such a request, in determining to which agency the land shall be transferred. Ibid.

The center also recommends that in addition to the agencies concerned, citizen groups, local government units, and others be permitted to participate in these hearings. Ibid., p. 46.

[117] This Commission has observed that from November 1971 through August 1974, "The White House was indifferent to suggestions for the development of a policy to use surplus property for housing." *To Preserve, Protect, and Defend the Constitution*, p. 30.

Concerning White House activities from August 1974 through August 1976, the Commission noted that "White House staff repeatedly learned about the importance of considering the need for low-income housing in making decisions concerning the disposal of Federal surplus property, but never took action to establish low-income housing as a priority for its use." Ibid., p. 75.

[118] Exec. Order No. 12,030, 42 Fed. Reg. 63,633 (1977).

[119] 42 U.S.C. § 3601 *et seq.* (1970).

[120] 15 U.S.C. § 1691-1691f (1976).

[121] The four Federal financial regulatory agencies are the Federal Reserve Board, Comptroller of the Currency, Federal Deposit Insurance Corporation, and Federal Home Loan Bank Board.

[122] Federal credit unions comprise the largest category of financial institutions in the United States. The total assets of all federally-chartered credit unions exceed $20 billion; the assets of all federally-insured credit unions presently exceed $29 billion.

[123] 12 U.S.C. § 1757 (1976). In the past, because of the limited maturity dates for real estate loans, Federal credit unions participated very little in the home mortgage market. Residential real estate loans comprised under 5 percent of all loans made by Federal credit unions.

[124] 12 U.S.C.A. § 1757 (1978).

[125] Lawrence Connell, Administrator, National Credit Union Administration, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 17, 1978 (hereafter cited as Connell letter). The Administrator of the National Credit Union Administration added these comments:

> Unlike state chartered credit unions, Federal credit unions have had a limited involvement in such lending prior to this time. Likewise, lending by credit unions can best be described as cooperative credit in that loans may be made only to members—that is, persons within the credit union's field of membership. Accordingly, it is not surprising to note that neither our examination nor our complaint handling programs have disclosed measurable discrimination in the area of housing loans. Ibid.

Both NCUA and FCA regulate the banking operations of their financial institutions through a rigorous examination process. For example, they oversee fiscal soundness by reviewing the financial institution's assets, liabilities, outstanding debts, and fiscal procedures. Both NCUA and FCA examine their regulatees for compliance with applicable laws. In addition to the responsiblity of NCUA and FCA to administer their programs relating to housing affirmatively to further the purposes of Title VIII,[126] the Equal Credit Opportunity Act (ECOA) specifically names these two agencies to oversee compliance with ECOA by the financial institutions they regulate.[127] NCUA has observed that:

> [NCUA's examination process] includes examination for compliance with the requirements and prohibitions of ECOA and the Fair Housing Act. Related enforcement programs include specialized examiner training, data systems regarding compliance with these laws as well as consumer complaints and an active informational program for Federal credit unions (our "regulatees").[128]

Both agencies have published only general nondiscrimination requirements in their regulations. The National Credit Union Administration's nondiscrimination regulations cover the advertisement of mortgage and home repair loans and the display of notices of nondiscrimination in the lobbies of Federal credit unions.[129]

Although NCUA's provisions for lobby and advertisement notices of nondiscrimination are useful tools to inform the public of the prohibitions against discrimination in mortgage finance, they are not sufficient for ensuring against such discrimination. They do not, for example, address practices such as redlining which are discriminatory in effect.[130] NCUA's advertising and poster requirements are similar to the ones issued by the Comptroller of the Currency, Federal Deposit Insurance Corporation, and the Federal Reserve System in 1971 and 1972.[131] Since these financial regulatory agencies have since issued more comprehensive nondiscrimination regulations, NCUA's nondiscrimination regulation lags far behind in its comprehensiveness. In August 1978, NCUA's Administrator wrote to this Commission:

> We have recognized the importance of going beyond. . .basic requirements, however, we are now developing an appropriate revision to Section 701.31 as well as a section dealing primarily with loan discrimination based upon geographical consideration. Data accumulation needs are also being addressed in this revision. I consider this a priority matter and can assure you of prompt action.[132]

NCUA states that it follows Regulation B[133] in its lending compliance program. NCUA's Administrator has elaborated:

> I would like to emphasize that our informational program has included providing all Federal credit unions with copies of ECOA-Regulation B, related official letters and a Manual of Laws explaining in detail the impact of these laws upon credit union operations. Also upon request we provide copies of this material as well as Fair Housing posters to State credit unions, and we develop and conduct educational training programs on these laws for credit union officials.
>
> These programs have enabled NCUA to communicate directly and clearly to our "regulatees" the details of their compliance requirements as well as the essence of our enforcement policies.[134]

In addition, on July 6, 1978, the National Credit Union Administration along with the Federal Reserve System, Comptroller of the Currency, Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board proposed uniform guidelines for the administrative enforcement of

[126] 42 U.S.C. § 3608(c) (1970).

[127] 15 U.S.C. § 1691k (1976). In response to a draft section of this chapter, the National Credit Union Administration wrote:

> The draft accurately summarizes the functions of the National Credit Union Administration and its enforcement roles under ECOA and Title VIII of the Civil Rights Act. It is also accurate to reflect the fact that NCUA has met its basic requirements under these laws. This includes the issuance of formal regulations or amendments thereto, when required, such as the addition of the terms "sex" to our Regulation 701.31 to the list of illegal grounds for discrimination in the financing of housing in accordance with P.L. 93-383. Connell letter.

[128] Connell letter.

[129] 12 C.F.R. § 701.31 (1977). These notices must incorporate a facsimile of the equal housing lender logotype.

[130] *To Provide. . .for Fair Housing*, p. 150.

[131] Ibid., p. 148.

[132] Connell letter.

[133] 12 C.F.R. § 202 *et seq.* (1977). Regulation B is the Federal Reserve Board's interpretive guidelines for the Equal Credit Opportunity Act. NCUA wrote, "We will continue to be guided. . .by the Federal Reserve Board's Regulation B and its interpretation thereof inasmuch as they have thus been responsive to our interpretive needs." Connell letter.

[134] Connell letter.

Regulation B, the Equal Credit Opportunity Act, and the Fair Housing Act.[135]

The Farm Credit Administration's regulations[136] prohibit discrimination in lending and services[137] and in advertising.[138] Farm Credit institutions that make rural mortgage and home repair loans must also post and maintain equal housing posters in their lobbies.[139] In another section of its regulation, FCA describes five basic credit factors pertinent to a sound loan as part of its general loan policies for banks and associations. It also specifies that consideration be given to the special credit needs of particular groups such as young farmers.[140]

In 1976 FCA amended its nondiscrimination regulations "in order to conform them to the requirements of ECOA."[141] FCA's amendment consisted of adding the protected classes of "age and marital status," named in ECOA, to the protected classes of "race, color, and sex" already named in its nondiscrimination regulations.

Although FCA's regulations are more comprehensive than NCUA's, they, too, fail to provide guidance on fair lending comparable in detail to the fair lending regulations issued by the Federal Home Loan Bank Board and the Federal Deposit Insurance Corporation in 1978.[142] Despite the fact that FCA describes credit factors and the application of credit standards in another section of its regulations, FCA fails to set standards for equal opportunity in mortgage lending. For example, FCA's credit regulations are silent on the consideration of farm and rural wives' incomes, part-time income, or alimony in the assessment of an applicant's creditworthiness. FCA regulations also do not prohibit practices that are discriminatory in effect, such as refusing loans in certain geographical areas or designating certain areas as the only ones in which loans will be made to minorities.

FCA commented:

> . . . it is difficult to envision how "redlining" could be accomplished by any lender in the Farm Credit System which can make loans only to farmers and ranchers, producers and harvesters of aquatic products, and to home owners in towns or cities which do not exceed 2,500 in population. In any event, no complaint against a Farm Credit institution involving "redlining" has ever been made to FCA, and we have not found evidence in any of the extremely few complaints of discrimination in lending we have received sufficient to support the allegations.[143]

FCA provides no factual basis for its belief that redlining is not prevalent in towns or cities with populations of 2,500 or under. This Commission believes that before FCA arbitrarily determines that there is no need for a regulatory provision on redlining, the matter should be studied further.

2. Federal Trade Commission

ECOA assigns the Federal Trade Commission (FTC) responsiblity for enforcing the provisions of ECOA for all creditors not already covered by other ECOA enforcement agencies.[144] Among the housing-related creditor groups that FTC has responsibility to oversee[145] are nondepository mortgage bankers and finance companies and Government agencies, such as the Veterans Administration and the Department of Housing and Urban Devel-

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[135] 43 Fed. Reg. 29,256 (1978). According to the National Credit Union Administration, "NCUA is taking a leading role among five Federal financial institution regulators in formulating a meaningful set of uniform ECOA enforcement guidelines. When finalized, they will be published in the *Federal Register*." Connell letter.

[136] The regulations of the Farm Credit Board, FCA's policymaking body, include a statement of policy on nondiscrimination in lending. This policy states that:

> . . .there shall be no discrimination because of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) by the banks and associations which operate under the supervision of the Farm Credit Administration. . .either as is now proscribed for the financing of housing by Section 805 of the Civil Rights Act of 1968 or with respect to the availability of loans generally from such banks and associations. 12 C.F.R. § 613.3140 (1977).

The policy statement was first adopted in 1969. In 1976 it was amended to add sex or marital status and age (provided the applicant has the capacity to contract) to the factors for which discrimination is prohibited by the Farm Credit Administration.

[137] 12 C.F.R. § 613.3150 (1977). In addition to the prohibitions proscribed in Section 805 of the Civil Rights Act of 1968, this section also makes it unlawful to allow, receive, or consider any application, request, or inquiry with respect to a loan on a discriminatory basis, or to refuse to perform any other services it customarily makes available to borrowers, applicants, or members.

[138] 12 C.F.R. § 613.3160 (1977).

[139] 12 C.F.R. § 613.3170 (1977).

[140] 12 C.F.R. §§ 614.4150, 614.4160, 614.4165, 614.4170 (1977).

[141] 41 Fed. Reg. 16,451 (1976) to be codified in 12 C.F.R. § 613.3150 (1977).

[142] FCA does send memoranda and respond to questions its financial institutions have about complying with ECOA and Regulation B. Robert Lowerre, Office of the General Counsel, Farm Credit Administration, telephone interview, Mar. 31, 1978. FCA also issued "Official Staff Interpretations" of ECOA. Deputy Governor, Office of Credit and Operations, Farm Credit Administration, memorandum to the Presidents of Each Farm Credit Bank, "Equal Credit Opportunity—Revised Regulation B, ECOA—Federal Reserve Board Annual Report to Congress for 1976," Feb. 22, 1977.

[143] Daniel L. Monson, General Counsel, Farm Credit Administration, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 11, 1978.

[144] 15 U.S.C. § 1691c(c) (1976).

[145] FTC also oversees all retail businesses, department stores, consumer finance companies, and nonbank credit card users. 12 C.F.R. § 202, Appendix A (1977).

opment, that make mortgage loans and set terms and conditions for the loans they guarantee and insure.[146]

The FTC oversees mortgage lenders who play an influential role in home mortgage finance. Mortgage bankers[147] for example, originate approximately 20 percent of all home mortgages and 90 percent of all Government insured and guaranteed mortgages.

The Federal Trade Commission follows Regulation B for its enforcement of ECOA. In August 1978, FTC described to this Commission its activities related to ECOA:

> Notwithstanding our lack of authority to promulgate substantive regulations implementing Regulation B, the Commission and its staff have been very active in the Federal Reserve Board's rulemaking process. In this regard, staff has submitted extensive comments on both versions of amended Regulation B and requested that the Board reconsider two staff interpretations. . . .In addition, in its 1977 Annual Report to the Board, the Commission recommended sixteen amendments to Regulation B. . . .The staff of the Commission recently supplemented the requests made in the Annual Report by providing additional information regarding four proposed amendments. . . .
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> You should also be aware that the Commission has authorized a study of the mortgage banking industry pursuant to its industry-wide investigation of Unnamed Mortgage Lenders. The report which will be produced pursuant to this study will include an analysis of whether the Commission should require additional monitoring information by creditors under our jurisdiction. . . .Because this study will not be completed until the fall, we cannot now provide you with any firm indication as to whether additional monitoring requirements will be imposed.[148]

Unlike the five financial regulatory agencies that have proposed uniform guidelines for the administrative enforcement of ECOA,[149] FTC, as of August 1978, had not issued administrative enforcement guidelines of its own for the creditor groups under its jurisdiction. While FTC's industrywide investigation of mortgage bankers appears worthwhile and helpful to FTC in performing its enforcement duties, administrative enforcement guidelines would clarify FTC's enforcement procedures and administrative remedies for noncompliance.

3. The Small Business Administration (SBA)

SBA guarantees loans to victims of floods, riots, civil disorders, and other catastrophes to help them repair, rebuild, or replace their homes.[150] Therefore, it has a responsibility to ensure that the lenders who cooperate with SBA for guaranty agreements comply with Title VIII and ECOA. SBA, however, does not agree. It wrote to this Commission:

> The banks which make loans to recipients which SBA guarantees are monitored by those agencies which have the responsibility for monitoring banks such as the Federal Reserve Board, the Federal Deposit Insurance Corp., etc. As stated in the regulations, SBA monitors those Small Business Investment Companies, State and Local Development Companies and other such lenders, which are also recipients and are licensed by it to lend monies to small business concerns. Consequently, the statement that SBA has the "responsibility to ensure that the lenders who cooperate with SBA for guaranty or insurance agreements comply with Title VIII". . . .is not accurate.[151]

This Commission stands by its assertion that SBA has responsibility to ensure that the lenders who cooperate with SBA for guaranty agreements comply with Title VIII and ECOA. Title VIII of the Civil Rights of 1968 requires SBA to affirmatively further the purposes of Title VIII through the administration of its housings programs and activities.[152] It is also incumbent upon SBA to do so because, by guaranteeing loans made by a private

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[146] Federal Trade Commission, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 27, 1978.

[147] Mortgage bankers are a class of mortgage lenders who function, via local real estate brokers, primarily as intermediaries between the borrowers and investors who make up the secondary mortgage market. Mortgage bankers do not accept deposits from customers as banks or savings and loan associations do. They are referred to by HUD as "nonsupervised" lenders because they are not subject to regulation by any Federal or State regulatory agency.

[148] Michael Pertschuk, Chairman, Federal Trade Commission, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 26, 1978.

[149] These proposed guidelines are discussed in the section on the National Credit Union Administration in this chapter.

[150] SBA also guarantees directly, and indirectly through lenders, loans to small businesses to help them finance plant construction, conversion, or expansion, or to acquire equipment or facilities.

[151] A. Vernon Weaver, Administrator, Small Business Administration, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 22, 1978 (hereafter cited as Weaver letter).

[152] 42 U.S.C. §§ 3601–3631 (1970). Exec. Order No. 11,063 requires executive departments and agencies, including SBA, to:

> take all action necessary and appropriate to prevent discrimination because of race, color, creed or national origin in the lending practices with respect to residential property and related facilities of lending institutions, insofar as such practices relate to loans hereafter insured or guaranteed by the Federal government. 3 C.F.R. 652 (1959–1963 Compilation).

lender, SBA provides a benefit to the lender by minimizing the risk assumed by the lender.[153] In light of this benefit, if a lender fails to practice equal opportunity with regard to persons eligible for SBA loans, SBA will, in effect, be a contributor to the discrimination.

It would appear that SBA nondiscrimination regulations which prohibit discrimination by "all recipients of financial assistance from SBA"[154] and are designed "to reflect to the fullest extent possible the nondiscrimination policies of the Federal Government,"[155] should be applied to lenders who do business with SBA. SBA regulations do not clearly state that lenders who participate in its guarantee loan program are covered.[156]

4. National Aeronautics and Space Administration (NASA)

Section 809 of the National Housing Act of 1934, as amended, authorizes NASA to participate in the Federal Housing Administration (FHA) mortgage insurance program.[157] According to NASA, "the 809 program is designed for those eligible NASA or NASA contractor employees at NASA installations to allow them to qualify for HUD mortgage insurance in isolated areas where adequate housing is not available in the open market."[158]

NASA describes its responsibility as follows:

> . . .with regard to section 809 of the National Housing Act of 1934 as amended, NASA's role is limited to acting as contingent guarantor of mortgages issued to eligible employees. The primary responsibility for approving these mortgages remains with FHA [Federal Housing Administration, Department of Housing and Urban Development] and NASA only assumes responsibility for losses incurred when there are insufficient funds under FHA administered mortgage insurance trust funds. To data no NASA funds have been required. Individual mortgages result by arrangement directly between the employee and the lender as approved by FHA.[159]

Although it is incumbent upon NASA not to confer benefits on those lenders who discriminate in mortgage finance, NASA has not issued equal mortgage lending regulations of its own. Indeed, it does not even have a written equal mortgage lending policy.[160]

NASA believes that an agreement it signed with the Department of Housing and Urban Development to ensure fair housing for NASA employees obviates the need for such regulations. It has written to this Commission:

> Even though NASA has not issued specific lending regulations of its own, the provisions of NASA policy stated in the NASA/HUD Interagency Agreement of Fair Housing (Jan. 11, 1977), are sufficiently broad to cover transactions under the 809 program.[161]

NASA's agreement with HUD is an internal document and not an instruction to lenders. Moreover, it makes no mention of equal mortgage lending.[162]

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[152] SBA regulations also permit lenders to advertise their participation in SBA programs (13 C.F.R. § 120.5 (a)(4)(1978)), which may assist the lenders by attracting additional business.

[154] 13 C.F.R. § 113.1 (1978) and 13 C.F.R. § 112.1 (1978) SBA promulgated two sets of regulations related to nondiscrimination in its federally-assisted programs. One effectuates Title VI of the Civil Rights Act of 1964; the other reflects additional Title VI provisions and other nondiscriminatory provisions applicable to all recipients of SBA direct assistance and guaranty agreements. The latter regulation prohibits recipient creditors from discriminating against any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, or being recipients of income from public assistance. (13 C.F.R. § 113.1 (b)(1978)). 13 C.F.R. § 112.1 *et seq.* (1978) and 13 C.F.R. § 113.1 *et seq.* (1978).

[155] 13 C.F.R. § 113.1 (1978).

[156] SBA regulations do state that "for the purposes of this part, a paragraph (b) lender (13 C.F.R. § 120.4 (b)) shall be deemed a recipient of financial assistance" (13 C.F.R. § 113.2 (b) (1978)). However, as SBA has written to this Commission, these lenders are:

> . . .the licensed Small Business Investment Companies, State and Local Community Development Companies which receive monies from SBA to lend to small business concerns. A small group of non-bank lenders whose loans to small business concerns are guaranteed, in part, by SBA are treated as recipients and are covered by its nondiscrimination regulations. Weaver letter.

[157] 12 U.S.C. § 1748h-1(g) (1976). As of Sept. 30, 1977, NASA guaranteed mortgages for 3,317 houses, totaling $62,023,000.

[158] NASA, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 23, 1978. Employees at the following NASA installations were eligible for the Section 809 Program: (1) the Marshall Space Center in Huntsville, Ala.; (2) National Space Technology Laboratories, Bay St. Louis, Miss., and (3) Dryden Flight Research Center, Edwards, Calif.

[159] Harriett G. Jenkins, Director for Equal Opportunity Programs, National Aeronautics and Space Administration, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 15, 1978 (hereafter cited as Jenkins letter). The Administrator of the National Aeronautics and Space Administration (or designee) is authorized to guarantee and indemnify against loss to the extent required by Secretary of Housing and Urban Development. 12 U.S.C. § 1748h-1(g) (1976).

[160] NASA response.

[161] Jenkins letter.

[162] The most pertinent passage in the agreement merely states that NASA supports HUD's strategy for "Affirmative use of agency funding authority over government-sponsored projects to further the purposes of the Fair Housing Law." Interagency Agreement Between the Department of Housing and Urban Development and the National Aeronautics and Space Administration Concerning the Advancement of Fair Housing and the Location of Government-Sponsored Facilities, effective Jan. 11, 1977.

B. Government as Creditor

The Federal Government functions as a mortgage creditor when it makes loans or sets credit standards, as it may when it guarantees, insures, or purchases home loans. There are a number of programs in which the Government acts as a creditor. For example, previous chapters describe the home loan programs of the Department of Housing and Urban Development, Veterans Administration, and Farmers Home Administration. In its capacity of mortgage creditor, the Federal Government has a responsibility to comply with the Equal Credit Opportunity Act[163] and Title VIII of the Civil Rights Act of 1968.[164]

The Equal Credit Opportunity Act requires that Government must comply with the provisions of the act.[165] Like any other creditor, the Federal Government is prohibited from discriminating against any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or because an applicant exercised his or her rights under the Consumer Credit Protection Act.[166]

Although Title VIII does not specifically require Federal agencies to comply with its prohibitions against discrimination, the Government has a constitutional duty to practice equal opportunity in its programs.[167]

SBA

In addition to making direct and guarantee loans to small businesses, SBA also makes disaster loans to individuals, small businesses, and larger businesses that would not normally qualify because of their size for SBA assistance. Because it makes loans, SBA itself has a responsibility to practice equal opportunity in its lending activities. However, as of May 1978, SBA had issued no regulations which recognized this responsibility. SBA efforts have been directed at enforcing compliance with Title VI and other nondiscrimination provisions by SBA recipients.[168]

C. Deposit of Federal Funds

The Federal Government maintains on deposit large amounts of monies with financial institutions. Banks derive substantial benefit from the deposit of public funds to their care. Some of these funds may be utilized in income-earning investments, including the making of mortgages.

In the view of this Commission, the benefits that depositary institutions receive from the use of Federal deposits are likely to be covered by Title VI of the Civil Rights Act of 1964, which states that no person shall on the grounds of race, color, national origin, or sex be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with Federal funds.[169] It appears to this Commission that the Government has a responsibility to ensure that depositary institutions do not discriminate in mortgage finance.

The Department of the Treasury, however, has concluded that the desposit of Federal funds in commercial banks does not constitute a program of financial assistance so as to subject the banks to Title VI of the Civil Rights Act of 1964. The Assistant General Counsel of the Department of the Treasury has written:

> . . . .if, in fact, large deposits of Government funds are maintained in commercial banks, and some of those funds remain available for income earning investment by the banks, no program of financial assistance by the Government is involved. The Government does not maintain deposits in banks to assist them and to argue

[163] 15 U.S.C. §§ 1691–1691f (1976).

[164] 42 U.S.C. §§ 3601–3631 (1970).

[165] 15 U.S.C. §§ 1692(e)–1692(f) (1976). ECOA defines creditor as "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." ECOA also defines the term "person" to mean a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association. The act of setting credit standards constitutes a form of participation in the decision to extend, renew, or continue credit.

[166] 15 U.S.C. § 1691(a) (1976).

[167] The Government's constitutional obligations for ensuring equal opportunity in its own programs are discussed in U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort 1971*, pp. 370–71. See also, Richard M. Nixon, "Statement by the President on Federal Policies Relative to Equal Housing Opportunity," June 11, 1971, *Weekly Comp. of Pres. Doc.*, vol 7, January–June 1971, p. 895.

[168] From 1973 through 1977, SBA received no more than two complaints having to do with fair housing practices in its loan program for rebuilding or repairing homes damaged or destroyed by disaster. SBA response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 27, 1978. Nonetheless, in August 1978, SBA stated:

> For many years, the Compliance Division of SBA has monitored the Agency's program and disaster offices for compliance with Title VI and its other nondiscrimination requirements. This monitoring is accomplished through investigations of complaints lodged against an SBA program office or official by a member of the public or through routine compliance reviews of program and disaster offices.
>
> Although it does not appear in our regulations, the Standard Operating Procedures (SOP 90 30) for the Compliance Division of SBA, at paragraph 29 (b)(2) reads, in part, as follows:
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> "In the case of an SBA office, a review should be initiated when the office's minority loan profile appears consistently bad or suddenly deteriorates." Weaver letter.

[169] 42 U.S.C. § 2000d (1970).

> that monies on deposit retain their Federal character when invested by the bank in housing mortgages is contrary to the fact and law. Reduced to its simplest terms, this would mean that if an individual kept money on deposit in a bank he could claim credit for financing the activity in which the bank invests its monies. This is patently absurd. If the deposit of Federal funds in commercial banks is not a program of financial assistance to the banks, then it follows that such deposits are not subject to Title VI of the Civil Rights Act of 1964 and it further follows the Government would not by reasons of such deposits have a responsibility to ensure that depository institutions do not discriminate in mortgage financing.[170]

The Government's purpose in placing deposits in commercial banks is not a relevant factor in determining whether any benefits covered by Title VI result.[171] Thus, the Department of Treasury's position is not convincing. To the extent that the banks are free to use Federal deposits in income-earning investments, the banks derive benefit from these deposits, even if the Government does not intend to provide assistance to banks by placing its deposits with them.

Even if there is no legal requirement that Federal depositaries be equal opportunity lenders, there is some precedent for the Government to use its deposits affirmatively as a mechanism to further equal opportunity goals by providing assistance through the deposits of funds to banks that are equal opportunity lenders. The minority bank deposit program,[172] under the auspices of the Department of the Treasury, encourages Federal agencies to deposit funds in minority banks.[173] Similarly, the Government could encourage Federal agencies to deposit funds in institutions which practice equal mortgage lending. Under the authority of Title VIII of the Civil Rights Act of 1968, Treasury could affirmatively further the purposes of Title VIII by selecting only those financial institutions that have good equal opportunity records to be Federal depositaries. Furthermore, the Department of the Treasury could write into its contractual agreements with financial institutions a provision for equal opportunity lending. This contractual agreement already requires Federal depositaries to comply with Executive Order 11,246, which requires banks and other financial institutions to be equal opportunity employers.[174] However, no Federal agency surveyed by this Commission, including the Department of the Treasury, has taken any action to require that their own depositaries be equal opportunity lenders.

In contrast, the Office of Revenue Sharing (ORS) of the Department of the Treasury stated in an October 1977 letter to the chief executive officers of those governments which are revenue sharing recipients:[175]

> . . .As a primary recipient of revenue sharing funds, you have a responsibility also to ensure that the banks or other financial institution in which you have revenue sharing funds on deposit is an equal opportunity employer and lender. You should request assurance from your bank or financial institution of its equal opportunity policies, along with appropriate supporting documentation. Please keep this information on file for examination by representatives of this Office and by representatives of the Comptroller General of the United States, as is required by law. If any bank or other financial institution is not cooperative in providing you with its assurance and supporting documentation, please advise [the Director of ORS] so [she] can take appropriate action.[176]

[170] William J. Beckham, Jr., Assistant Secretary (Administration), Department of the Treasury, letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Aug. 23, 1978 (hereafter cited as Beckham letter), attachment from Wolf Haber, Assistant General Counsel.

[171] For example, the Government's intention is not the determining factor with regard to Title VI coverage in the Veterans Administration's program to provide monetary subsidies to veterans for their education. Educational institutions which ultimately receive the funds are required to comply with Title VI, although providing assistance to educational institutions is not the purpose of the program. See Department of Justice, Interagency Survey Report, Evaluation of Title VI Enforcement at the Veterans Administration (December 1975), p. 2.

[172] The minority banking program is a combined Government-private program to increase the deposit balances in minority banks. The Department of Commerce coordinates the private phase of the program, while the Department of the Treasury coordinates the Government phase. U.S. Department of Commerce, "Government-Private Program to Increase Deposit Balances in Minority Banks," *News*, Oct. 2, 1970.

[173] Executive Office of the President, Office of Management and Budget, Memorandum for Heads of Departments and Agencies, "Deposit Program for Minority Banks," Oct. 2, 1970. See also, Presidential Memorandum for the Heads of Departments and Agencies, Apr. 8, 1977. As of June 30, 1977, 14 Federal agencies had deposits in minority banks, totaling $99,825,000. The 14 agencies are the Departments of Agriculture; Commerce; Defense; Energy; Health, Education, and Welfare; Housing and Urban Development; the Interior; Labor; Transportation; and the Treasury; and the Community Services Administration, Federal Deposit Insurance Corporation; National Science Foundation; and U.S. Postal Service. U.S. Department of the Treasury, Bureau of Government Financial Operations, "Federal Government-Controlled Deposits With Minority Banks at June 30, 1977." As of Dec. 31, 1977, Government-controlled funds on deposit in minority banks totaled approximately $127 million. Beckham letter, attachment from D.A. Pagliani, Commissioner, Bureau of Government Financial Operations.

[174] 31 C.F.R. § 202.4 (1977).

[175] Pay letter from Bernadine Denning, Director, Office of Revenue Sharing, to Revenue Sharing Recipients, Oct. 7, 1977.

[176] Ibid.

Although the nondiscrimination requirement of the State and Local Fiscal Assistance Act is similar to Title VI of the Civil Rights Act of 1964, this Commission knows of no other agency dispensing Federal financial assistance that has taken similar action, and ORS is to be commended.[177]

The Office of Revenue Sharing, however, cautions that ORS' action constitutes an encouragement and is not a requirement for recipient governments. Specifically, it stated:

> We note. . .that § 122 of the Revenue Sharing Act does not provide the authority for the ORS to require that recipient governments monitor depository banks for discrimination in lending and employment practices.
>
> [T]he intent of [the ORS] letter of October 8, 1977. . .is to encourage (but not to require) recipient governments to maintain their accounts in banks whose equal employment and lending status they have investigated. Although § 122 and Title VI are not applicable to the deposit transactions, the Equal Credit Opportunity Act of 1976 (Title VII of the Consumer Credit Protection Act, as amended, 15 U.S.C. § 1601 *et seq.*) prohibits discrimination in credit transactions by all commercial credit institutions. Therefore, in furtherance of the policy of the Act, the ORS should refer any information concerning discriminatory lending practices of depository banks to the appropriate compliance agencies.[178]

VII. Resource Allocation

A. Staffing

None of the 55 agencies surveyed by this Commission reported that it had permanent, full-time fair housing staff. The Social Security Administration, Department of Health, Education, and Welfare, stated that it had six full-time employees and 1 half-time employee to assist other employees with housing needs. It did not, however, indicate what, if any, percent of their time was spent on fair housing. The Federal Trade Commission reported that in fiscal year 1978, staff with Equal Credit Opportunity Act responsibilities spent a total of 5 professional staff years to mortgage-related activities; the Department of Commerce reported that it spent approximately 1.2 staff years on fair housing activities, distributed among 20 persons. Of the 52 other agencies surveyed,[179] only 15 reported spending any staff time on fair housing activities, but none of them stated that they allocated more than 0.1 person years to fair housing.[180]

Thus, fair housing was, for the most part, carried out in conjunction with other staff duties. Most fair housing staff members had primary responsibility for personnel duties or for other civil rights compliance programs. The time spent on fair housing was used attending the meetings of the Equal Housing Opportunity Council and providing information to employees on fair housing. In at least two agencies, staff time was allocated to the investigation of housing complaints and to compliance reviews related to housing.[181]

Agency training devoted to fair housing programs was either minimal or nonexistent. The one or two agencies that had fair housing training reported that it was included in their equal employment opportunity training.[182] One agency reported that a small number of its staff members attended seminars on fair housing.[183] None of the agencies questioned had a formal training program specifically for fair housing.

[177] In 1976 the staff of this Commission wrote to ORS concerning the question of ORS' jurisdiction over lending institutions. The staff of this Commission concluded that ORS' civil rights jurisdiction indeed covered lending institutions. John A. Buggs, Staff Director, U.S. Commission on Civil Rights, letter to Jeanna D. Tully, Director, Office of Revenue Sharing, Department of the Treasury, Sept. 6, 1976.

[178] Beckham letter, attachment from Herman Schwartz, Chief Counsel, Office of Revenue Sharing.

[179] Some agencies did not respond to this Commission's inquiries about fair housing staffing, although they did use staff for fair housing activities. For example, the Farm Credit Administration employs examiners who also check financial institutions for compliance with fair housing and other consumer-oriented laws.

[180] The Department of Labor has 1 person who spends 5 percent and 17 persons who spend 0.5 percent of their time on fair housing. The Department of Transportation has three persons who work on fair housing part time but does not know how much time they spend at this activity. The following are the number of people working in fair housing and the percent of time they spend on fair housing in the remaining agencies: ACTION, 2 people, less than 5 percent of their time; Commodity Futures Trading Commission, 2 people, 2 percent of their time or less; Environmental Protection Agency, 1 person, less than 1 percent, and 11 persons, less than 5 percent; Federal Trade Commission, 1 person, 2 percent; Indian Claims Commission, 1 person, nominal; National Aeronautics and Space Administration, 10 people, from time to time as needed; National Labor Relations Board, 2 people, less than 5 percent; National Science Foundation, minimal; National Transportation Safety Board, 1 person, 1 percent; Small Business Administration, 38 people, 0.1 percent; Tennessee Valley Authority, 1 person, 5 percent; U.S. Information Agency, 1 person, 5 percent; and U.S. Postal Service, 1 person, part time.

[181] In the past 5 years, the Small Business Administration, for example, received two complaints involving fair housing practices. In July 1977 the Federal Trade Commission began conducting industry-wide compliance investigations of mortgage lenders.

[182] Small Business Administration, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 27, 1978.

[183] U.S., Department of Transportation, response to the U.S. Commission on Civil Rights Fair Housing Questionnaire, Mar. 1, 1978.

B. Budget

Fair housing was such a minor budget item that only two agencies reported definite figures. The Department of Labor reported that it spent approximately $10,500 on fair housing activities for fiscal years 1976 through 1978.[184] For fiscal year 1979, the Department of Labor has budgeted $4,247 for fair housing activities. The Department of Transportation reported that it spent $123,000 in fiscal year 1976 and $126,000 in fiscal year 1977. It had budgeted $125,000 for 1978 and $121,000 for 1979.[185] Nine agencies could not identify their expenditures on fair housing because fair housing was subsumed under other program items.[186] The other 44 agencies responded that they made no expenditures.

Despite the significance of the responsibilities the 55 agencies reviewed have for furthering equal housing opportunity, these agencies have devoted few resources to fair housing. Fair housing programs and activities were almost nonexistent in the majority of these agencies. At best, they were low priority items. Although the 55 agencies could exercise their authority to further fair housing, the meager resources that they have allocated for fair housing are evidence that they are doing little to carry out the congressional intent of Title VIII and to ensure equal housing opportunity for all Americans.

[184] On fair housing activities, the Department of Labor spent $3,159 for fiscal year 1976, $3,150 for fiscal year 1977, and $3,861 for fiscal year 1978. U.S., Department of Labor, response to U.S. Commission on Civil Rights Fair Housing Questionnaire, Jan. 16, 1978.

[185] U.S., Department of Transportation, response to U.S. Commission on Civil Rights Fair Housing Questionnaire, Mar. 1, 1978.

[186] These nine agencies were: the Department of Commerce, the Federal Communications Commission, Federal Maritime Commission, Federal Trade Commission, Indian Claims Commission, National Aeronautics and Space Administration, National Credit Union Administration, National Labor Relations Board, and Tennessee Valley Authority.

Chapter 9

INTERAGENCY COORDINATION

Summary

As the Federal agency responsible for overall administration of the most significant fair housing law, Title VIII of the Civil Rights Act of 1968, the Department of Housing and Urban Development (HUD) has a duty to provide guidance and coordination to other Federal agencies with Title VIII responsibilities. As a response to this duty, HUD's principal activity has been to establish and take a leadership role on the Federal Equal Housing Opportunity Council. However, this Council has been given low priority at HUD and has proved ineffective as a means of coordinating Federal fair housing efforts.

HUD's main focus in directing the Council's activities has been to promote the HUD-developed Interagency Fair Housing Agreement, which primarily concerns equal housing opportunity for Federal employees. However, as of July 1978, only 8 of 52 Council member agencies had signed this agreement. Moreover, although one of the goals of the Council is to use Federal funding affirmatively to further the purposes of Title VIII, the Council has not developed any Government-wide agreement as to how this goal might be implemented. The Council has not attempted to seek interagency solutions to the problems of exclusionary zoning, discrimination in mortgage finance, lack of data on the extent of discrimination by the real estate industry, or the need for interagency sharing of compliance information.

In the absence of a viable coordinating mechanism, coordination of Federal equal opportunity requirements placed on the real estate industry has been poor. HUD, the Veterans Administration, and the Farmers Home Administration have established inconsistent affirmative fair marketing requirements for program participants. These agencies have also placed inconsistent requirements on brokers who handle properties the Government has acquired through foreclosure.

Despite statutory overlap in Federal agency fair housing enforcement responsibilities created by Title VIII of the Civil Rights Act of 1968, the Equal Credit Opportunity Act, and the equal opportunity provisions of Title VI of the Civil Rights Act of 1964, there exists no Government-wide system for gathering, storing, or sharing fair housing information. Thus, there is no mechanism to prevent duplicative reviews and investigations, to ensure that participants in one Federal program who violate Title VIII are not allowed to continue that violation in other Federal programs, and to enable HUD to be aware of all possible Federal sanctions when it attempts to conciliate resolution of a Title VIII violation.

HUD and the Department of Justice (DOJ), although signatories since 1972 to a Memorandum of Understanding designed to coordinate information sharing, have not effectively carried out their commitments under this agreement. DOJ has generally provided HUD with the information called for. HUD, however, has not been equally attentive to the agreement and has failed to send DOJ lists of complaints and conciliation agreements on a regular basis. Since early 1977, DOJ, HUD, and the four Federal financial regulatory agencies have been party to an agreement calling for information sharing on cases involving financial discrimination. Through late 1977, however, the regulatory agencies had not provided HUD with the required complaint reports, and HUD had not provided the regulatory agencies with the required reports of its own activities.

I. Introduction

The first seven chapters in this report identify ten agencies with major fair housing responsibilities: the Departments of Agriculture, Defense, Housing and Urban Development, Justice, and the Treasury, and the Federal Deposit Insurance Corporation, Federal Reserve Board, Federal Home Loan Bank Board, General Services Administration, and Veterans Administration.

Chapter 8 identifies fair housing responsibilities which belong to all Federal agencies and discusses in some detail the duties of such agencies as the Departments of Commerce, the Interior, Labor, and Transportation; Environmental Protection Agency; Equal Employment Opportunity Commission; Farm Credit Administration; Federal Trade Commission; National Aeronautics and Space Administration; National Credit Union Administration; and Small Business Administration.

The agencies identified in the first eight chapters overlap with regard to the segments of the real estate industry with which they come in contact.[1] For example, both the Department of Housing and Urban Development and the Department of Justice may investigate complaints of discrimination against builders, developers, lenders, real estate agents, public housing authorities, sellers, or advertisers of real estate. Builders who participate in Department of Housing and Urban Development (HUD) programs may also participate in Veterans Administration (VA) and Farmers Home Administration (FmHA) programs. Local governments which receive HUD assistance for community development may also receive assistance for community development activities from the Environmental Protection Agency or the Department of the Interior. VA has an affirmative responsibility to ensure that certain lenders practice equal mortgage lending. Responsibility for ensuring equal mortgage lending by those lenders also rests with the Federal financial regulatory agencies.

II. Federal Fair Housing Requirements for the Real Estate Industry

The Department of Housing and Urban Development (HUD), the Farmers Home Administration (FmHA), and the Veterans Administration (VA) all require builders and developers who receive approval for subdivisions to develop affirmative marketing plans.[2] Exhibits 9.1–9.5 are an analysis of the affirmative marketing instructions the three agencies have provided to these groups. These exhibits identify the major affirmative marketing requirements imposed upon builders and developers who apply to HUD, VA, and FmHA for subdivision approval. To illustrate the differences and inconsistencies that confront these applicants,[3] the exhibits are based only on language taken directly from the material provided to program participants.[4] The exhibits do not attempt to cover agency internal interpretations of forms and regulations, except insofar as these interpretations are explained on statements circulated to applicants and program participants. As shown in the exhibits, the requirements placed upon the participants in HUD, VA, and FmHA programs differ widely. As shown in exhibit 9.1, the three agencies provide inconsistent instructions as to the types of discrimination prohibited in marketing properties and the affirmative steps required to ensure that fair housing is practiced. For example, the instructions of all three agencies require builders and developers to indicate their fair housing intent in their advertising through symbols, slogans, and statements. HUD and FmHA also detail affirmative steps that must be taken, including soliciting minority and women buyers and

[1] Unless otherwise indicated, the analyses and evaulations in this chapter are based on information provided in the first eight chapters of this report.

[2] The affirmative marketing requirements and the deficiencies in those requirements are discussed in the chapters in this report on those agencies. This section primarily concerns inconsistencies among those agencies' approaches to affirmative marketing.

[3] VA, however, apparently sees no value in an analysis of Federal affirmative marketing requirements as communicated to those who must comply with the plans. It wrote to this Commission, "The rationale of outlining agency requirements without agency interpretations or agency housing program operations for the purpose of highlighting what program participants must interpret for themselves is specious at best." Max Cleland, Administrator, Veterans Administration, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 29, 1978 (hereafter cited as Cleland letter).

[4] The following are the sources of information for the exhibits in this chapter: HUD–Affirmative Fair Housing Marketing Regulations, 24 C.F.R. § 200.600–640 (1977); Advertising Guidelines for Fair Housing, 40 Fed. Reg. 20,080 (1975); Fair Housing Poster, 24 C.F.R. § 110.1-.30 (1977); HUD Affirmative Fair Housing Marketing Plan, Form HUD–935.2 (3–76); HUD/FHEO Monthly Rental Report, Form HUD–935.4 (3–76); and HUD/FHEO Monthly Sales Report, Form HUD–935.1 (11–76). FmHA—FmHA Affirmative Action, 42 Fed. Reg. 45,893 (1977); and HUD Affirmative Fair Housing Marketing Plan, Form HUD 935.2 (3–76). VA—VA Affirmative Marketing Certification, VA Form 26–8791, April 1977; VA Advertising Guidelines for Fair Housing (printed on Form 26–8791). An important difference among the agencies' affirmative marketing requirements is the various means employed by each agency to communicate these requirements to builders. For example, HUD's requirements are contained in three separate sets of regulations, an affirmative marketing plan form, and two reporting forms. FmHA has published its own, single set of regulations and also utilizes the affirmative marketing plan form published by HUD, while VA simply uses a certification with advertising guidelines printed on the reverse side to inform builders of their affirmative marketing obligations.

EXHIBIT 9.1

Affirmative Marketing Instructions — Prohibitions and Requirements

What is Prohibited?	HUD	FmHA	VA
1. Discrimination in:			
a. Selling property	X	X	X
b. Showing property	X	X	X
c. Renting property	X	X	O
d. Solicitation of buyers and tenants	X	X	O
e. Determination of eligibility	X	X	O
2. Selective use of advertising	X	O	X
3. Use of code words denoting race, etc.	X	O	O
What is Required?			
1. Affirmative solicitation of minority and women buyers and tenants	X	X	O
2. Apprising minorities of properties in white areas	X	X	O
3. Use of minority media	X	X	O
4. Advertisements must include:			
a. Logo, slogan, or statement	X	O	X
b. Logo or statement	X	X	O

Key X = Explicitly stated in agency forms or regulations.
O = Not explicitly stated in agency forms or regulations.

tenants, using minority media to advertise properties for sale or rent, and advising potential minority buyers and renters of properties located in white areas. VA, on the other hand, does not require participants to engage in any such outreach activities to ensure that minorities and nonminorities will have an equal opportunity to purchase or rent available housing. VA has explained this difference between its own regulation and that of HUD and VA by saying:

> Builders in the VA program do not solicit buyers or tenants, they advertise the availability of properties for sale, hence the VA's affirmative advertising requirements. As used by HUD and in addition to affirmative advertising, "solicitation" means the builder contacting by direct mail, telephone contact or other means, persons referred by HUD to the builder. Such HUD referrals may be persons referred by public agencies responsible for providing relocation assistance and public housing authorities.[8]

VA does not appear to recognize that solicitation, or affirmative outreach activity, may be necessary to ensure that properties are marketed in a nondiscriminatory manner. Conventional advertising may be insufficient to attract buyers and tenants of all races and both sexes, especially in communities in which there has been a history of discrimination.

In addition, although HUD and FmHA requirements are more similar to each other than they are to VA requirements, there are a number of minor inconsistencies between HUD and FmHA that could be confusing to participants in the programs of both agencies. For example, as shown in exhibit 9.1, HUD, but not FmHA, explains that descriptions, such as near "an existing black development," or phrases, such as "Jewish home," which connote a racial or religious preference may not be used. Similarly, HUD, but not FmHA, prohibits the selective use of fair housing advertising. For example, advertising homes located in minority neighborhoods only in media that reaches that particular minority group violates HUD's requirements, but it is not explicitly prohibited by FmHA's requirements.

As shown in exhibit 9.2, the types of properties covered by the affirmative marketing instructions

[8] Cleland letter.

EXHIBIT 9.2

Affirmative Marketing Instructions — Coverage

Who Must Comply?	HUD	FmHA	VA
1. The applicant/participant	X	X	X
2. Others authorized to act for applicant/participant	X	O	X
What Is Covered?			
1. Proposed construction	O	O	X
2. Existing construction	O	O	X
3. Individual existing construction not previously occupied (appraisals only)	O	O	X
4. Rehabilitation	X	O	O
5. Development	X	O	O
6. Subdivisions of 5 or more lots, units, or spaces	X	X	O
7. Multifamily projects of 5 or more lots, units, or spaces	X	X	O
8. Mobile home parks of 5 or more lots, units, or spaces	X	O	O
9. Dwelling units — 5 or more	X	O	O
10. Single-family dwelling units — 5 or more	O	X	O

Key X = Explicitly stated in agency forms or regulations.

O = Not explicitly stated in agency forms or regulations.

also differ for the three agencies. VA's coverage is the broadest, extending to both "proposed and existing construction." HUD, on the other hand, only covers "development and rehabilitation" and thus, unless a property is being rehabilitated, its affirmative marketing requirement does not extend to existing construction. HUD and FmHA have coverage limited to instances in which there are five or more units only. VA has not. HUD explicitly covers both single family dwellings and mobile home parks. FmHA coverage is limited to single family dwellings and does not extend to mobile home parks. VA instructions make no explicit reference to single family dwellings or mobile home parks. HUD instructions cover rehabilitation, but FmHA's and VA's do not.[6]

Exhibit 9.3 reveals differences among the requirements placed by the three agencies on builders and developers for training and recruiting staff. For example, although all three require that staff be given instruction in fair housing, only HUD and VA require that it be in writing. Although all three require builders and developers to practice nondiscrimination in staff hiring, only HUD and FmHA require affirmative recruitment, and only those two agencies specifically state that they extend the nondiscrimination requirement to both sexes and all races.

Exhibit 9.4, which describes the procedures for submission and review of plans, reveals what are perhaps the major differences among the agencies' affirmative marketing requirements. HUD furnishes its participants with a prescribed affirmative marketing plan form in which builders and developers describe their plans to market properties affirmatively and to set goals for minority occupancy. When completed, the forms must be reviewed and approved by HUD. In addition, progress reports must be submitted to HUD on a monthly basis.

FmHA, too, requires participants in its programs to submit HUD's affirmative marketing plan forms, including minority occupancy goals, and FmHA

[6] VA commented:

VA approved 73 guaranteed loans for alterations and repair in CY 1977, a year that 383,862 loans were guaranteed. In addition when a veteran seeks an alteration or repair loan, the veteran has already determined what repairs will be made with a home improvement contractor. Cleland letter.

VA's comments concern rehabilitation done by the veteran homeowner not rehabilitation done by developers. Developers who purchase and rehabilitate large numbers of existing houses for the purposes of resale are not required to comply with FmHA or VA affirmative marketing requirements, even if subsequently veterans are permitted to obtain VA guaranteed mortgages or FmHA loans to purchase that housing.

EXHIBIT 9.3

Affirmative Marketing Instructions — Hiring and Training of Staff

What is Required?	HUD	FmHA	VA
1. Nondiscrimination	X	X	X
2. Affirmative recruitment	X	X	O
3. Instruction of staff in fair housing	X	X	X
4. Written instruction in fair housing	X	O	X
5. Training staff in fair housing	X	O	X
a. In fair housing policy	X	X	O
b. In fair housing techniques	O	X	X

Key X = Explicitly stated in agency forms or regulations.
O = Not explicitly stated in agency forms or regulations.

EXHIBIT 9.4

Affirmative Marketing Instructions — Submission and Approval of Plans

Requirement for plan	HUD	FmHA	VA
1. Plan must be submitted on HUD form	X	X	O
2. No plan required if signatory to a HUD-approved voluntary agreement	O	X	O
3. No plan required — signed certification only	O	O	X
4. Plan must include occupancy goals	X	X	O
Review of plan			
1. Plan or certificate filed with agency	X	X	X
2. Plan reviewed and approved by agency	X	X	O
3. No approval necessary if plan approved by another agency	O	X	O
4. Monthly reporting required	X	O	O
5. Plan must be available for public inspection	X	X	O

Key X = Explicitly stated in agency forms or regulations.
O = Not explicitly stated in agency forms or regulations.

also reviews those completed forms for approval. Alternatively, FmHA will recognize, in place of this form, a builder's participation in a HUD-approved voluntary affirmative marketing agreement.[7] FmHA does not require monthly progress reports.

In contrast with HUD and FmHA, VA requires only that applicants sign an affirmative marketing certification, which requires no active planning and no goals for minority occupancy. It is basically a signed promise to comply with VA's affirmative marketing requirements, and it is placed in VA's files. VA has no mandatory review or approval provisions.

VA wrote to this Commission:

> [T]he VA certification for builders was designed to complement the HUD affirmative marketing program. Hence the VA certification was designed to cover basic requirements upon which HUD staff and representatives of the local real estate industry could build. Whether this would include active planning, goals for minority occupancy or monthly status reports would be determined by HUD staff and the local industry representatives.[8]

As discussed in the chapter in this report on the Veterans Administration, VA's observations overlook the valuable gains which could be made if VA and HUD had identically strong affirmative marketing requirements. VA's response to this Commission's observation on the differences among the affirmative marketing requirements of HUD, FmHA, and VA presents a sharp contrast to FmHA's reply. FmHA wrote to this Commission, "FmHA regulations. . .will be reviewed. . .with the intention of expanding them to reflect the. . .requirements of the Veterans Administration and the Department of Housing and Urban Development."[9]

As shown in exhibit 9.5, all three agencies make the statement that sanctions are available to them in the event of noncompliance by participants in their programs. HUD and FmHA make clear that their authority includes but is not limited to the ability to deny participation or to request the Department of Justice to file suit against the participant. The only sanction that VA describes is refusal to appraise a builder's properties. VA affirmative marketing requirements do not state that it may deny a builder's request for subdivision approval. Moreover, because the requirements do not explicitly provide for referral to the Department of Justice, they do not clearly provide for sanctions against a builder whose properties have been appraised through VA and who then fails to adhere to VA's affirmative marketing requirements. VA's affirmative marketing requirements, however, apparently may not fully describe the range of sanctions available to VA. VA has written to this Commission:

> The Commission's observation that VA does not provide for sanctions against a builder who discriminates after the properties are appraised should be balanced by two observations: (1) the VA sanctions under such circumstances are identical to HUD sanctions; and (2) both VA and HUD can suspend a builder from further participation if the builder is found discriminating.[10]

In addition to the differences among the three agencies' affirmative marketing requirements (shown in exhibits 9.1 through 9.5), there are other interagency differences in requirements placed on the real estate industry. For example, VA has affirmative requirements for mortgage lenders participating in its programs.[11] HUD, FmHA, and the National Aeronautics and Space Administration (NASA) have not placed requirements on lenders similar to those of VA. Moreover, although HUD, FmHA, and NASA all provide for insurance of mortgages made by private lenders, none of them have explicitly adopted the Federal Reserve Board's ECOA requirements.[12]

Some of the differences in the agencies' requirements may be semantic. Indeed, in many instance VA believes that although the terminology it has used differs from that of HUD and/or FmHA, there is no substantive difference in the requirements of the agencies. However, this Commission does not agree with VA that the absence of substantive differences is obvious in all such instances which VA identified. For example, HUD requires that sales staff be trained in "fair housing policy," and VA requires that they be trained in "fair housing techniques." FmHA requires both. VA wrote to this Commission, "The distinction between proper training in policy versus proper training in techniques appears to be hair-splitting."[13] Although neither

[8] Cleland letter.

[9] Joan S. Wallace, Assistant Secretary for Administration, Department of Agriculture, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 22, 1978.

[10] Cleland letter.

[11] These requirements are discussed at length in the chapter on the Veterans Administration.

[12] These requirements are discussed at length in the chapter on the Federal financial regulatory agencies.

[13] Cleland letter. Similarly, VA has commented that "the distinction

EXHIBIT 9.5

Affirmative Marketing Instructions — Sanctions for Noncompliance

Sanctions provided	HUD	FmHA	VA
1. Agency may deny participation	X	X	O
2. Department of Justice may file suit against participant	X	X	O
3. Agency may refuse to appraise participant's properties	O	O	X

Key X = Explicitly stated in agency forms or regulations.
O = Not explicitly stated in agency forms or regulations.

agency defines these terms, it might be reasonable to assume that the difference between them is the difference between what fair housing laws require and how sales staff should act in order to achieve the purposes of the laws. Moreover, even if the agencies intend the phrases to be interpreted identically, the differences in language can be confusing.[14]

VA has criticized this analysis of Federal affirmative marketing requirements because "there is no effort to distinguish the difference in agency goals and program operations, for example HUD has multi-family, rental and subsidized housing programs, VA does not."[15] VA illustrates this assertion by noting that "Builders participating in the VA home loan program do not rent property to veterans, they sell properties."[16] VA apparently fails to consider the fact that when it provides approval to a subdivision, it is providing the builder or developer a benefit with regard to all housing in that subdivision, not merely that housing which is ultimately sold to veterans. After receiving subdivision approval, the housing is constructed and the builder is not required to sell that housing to veterans. Indeed, the builder may choose to rent,

between" a. the requirement to use a logo, slogan, or statement and b. the requirement to use a logo or statement noted in Exhibit 9.1 "is specious" and observes that "if one agency requires the use of a., obviously those in b. are also covered." While the difference between the two requirements may be minor, it should be noted that the use of the fair housing slogan will satisfy a HUD and FMHA requirement, but not a VA requirement. This distinction might create some inconvenience for builders.

[14] The confusion which may confront a builder or developer who is trying to understand the requirements which the three agencies have placed on him are illustrated by VA's comments on items 5 through 10 of Exhibit 9.2 concerning the coverage of affirmative marketing requirements:

> 5. Development: Development or construction of housing is the same as items 1 and 2, proposed and existing construction, and item 6, subdivisions; hence the VA certification applies to development of housing.
>
> 6. Subdivisions of 5 or more lots, units or spaces: first, the Commission should be alerted to the fact that both HUD and VA consider a subdivision to be 25 or more lots, thus the contradiction in terms. The VA certification applies to builders proposing to build 5 or more housing units, as well as builders proposing development of a subdivision.
>
> 7. Multi-family projects of 5 or more lots, units or spaces: The VA affirmative marketing certification is indeed applicable to builders of multi-family projects, provided multi-family project is defined solely as a condominium.
>
> 9. Dwelling units—5 or more: Since any number of dwelling units with which a builder would be involved would either be proposed or existing construction, items 1 and 2, the VA certification is certainly applicable.
>
> 10. Single-family dwelling units—5 or more: The comments for dwelling units above is equally as applicable to single-family dwelling units of whatever number. Cleland letter.

[15] Cleland letter.

[16] Ibid. Another illustration that VA has provided is with respect to Exhibit 9.1, line 1e. VA stated:

> Discrimination in determination of eligibility: determination of eligibility by builders in the VA program is precluded by the stipulation; "That neither the applicant nor anyone authorized to act for it will decline to show or sell any property included in such request to a prospective veteran purchaser because of his or her race, color, religion, sex or national origin."
>
> Since all loan applications are processed by lenders, there is no way a builder in the VA program can determine eligibility. Ibid.

This Commission notes that a provision against discrimination by builders in determining eligibility could protect against discrimination in the builder's process of prescreening interested homebuyers to ensure that they will be able to afford the housing they have offered to buy.

rather than sell, some or all of the housing. Thus, it would appear entirely appropriate that in exchange for providing subdivision approval, VA would obtain a promise from the builder to market affirmatively, through sales or rentals, all of the properties in the subdivision.[17]

Another example of interagency differences is illustrated by HUD, FmHA, and VA requirements on brokers who handle properties for the Government after the Government has acquired them through foreclosure. FmHA places the same detailed requirements on such brokers as it does upon builders and developers[18]—the same requirements shown in exhibits 9.1 through 9.5. VA and HUD, on the other hand, have acted jointly to require a mere promise to indicate fair housing intent through advertising,[19] which is similar to VA's affirmative marketing requirements for builders and developers.

III. Information Sharing

A. Agreement Between HUD and DOJ

In November 1972, DOJ and HUD signed a memorandum of understanding for the exchange of fair housing information between the two agencies.[20] A basic purpose of the agreement was to establish coordination in information gathering, to prevent possible duplicative investigations of complaints, and to enable DOJ to become better informed of potential Title VIII pattern and practice suits brought to the attention of HUD.[21] The information that was to be provided by HUD included the following:

- Information as to which of the matters submitted to HUD by DOJ involves a pending HUD matter;
- A biweekly compilation of new HUD matters;
- A monthly list of new conciliation agreements.[22]

In addition, DOJ agreed to provide HUD with a biweekly list of investigations commenced by DOJ and with a copy of DOJ's weekly report.[23]

Both parties agreed to review lists of new matters from the other agency and inform each other if they also had matters pending involving any parties on the lists. HUD has indicated that DOJ has been submitting information as agreed and conceded that HUD has not lived up to the agreement in full measure due to administrative burdens.[24] HUD has failed to abide by the agreement:

- HUD has failed to comply with its agreement to send DOJ a biweekly compilation of new complaints, including names of the complainant and respondent, the location of the disputed dwelling, and the status of the complaint.[25]
- HUD has not followed its agreement to send DOJ a monthly list of HUD's new conciliation agreements nor has it identified those agreements involving matters which DOJ has investigated.[26]

One reason for HUD's failure to comply with the agreement may be that the system for recording the complaints it receives has not been computerized. HUD maintains that it was therefore not possible to assemble regularly a list of complaints that can be sent to DOJ as agreed to in the memorandum. However, in August 1978, HUD wrote to this Commission:

> HUD provides information relating to specific individual matters that DOJ is interested in, and one staff person has been specifically designated to handle these requests from DOJ. Having completed the implementation of a semi-automated system of complaint reporting, we are now considering means of reinstituting a more extensive exchange of information with DOJ.[27]

In the meantime, as a result of HUD's failure to provide the information promised in the agreement, DOJ has not had access to information it needed for carrying out its own program. In at least one instance, HUD was attempting to conciliate a Title VIII complaint at the same time that DOJ, unaware of HUD's effort, was proceeding to file suit against

[17] This issue is also discussed in the chapter in this report on the Veterans Administration.
[18] 7 C.F.R. § 1901 (1977).
[19] These requirements are discussed at length in the chapters on the Veterans Administration and the Department of Housing and Urban Development.
[20] Memorandum of Understanding between Equal Opportunity, HUD, and Civil Rights Division, DOJ, signed for the respective agencies by Kenneth F. Holbert, Director, Oct. 23, 1972, and Frank E. Schwelb, Section Chief, Nov. 2, 1972 (hereafter cited as HUD–DOJ agreement).
[21] Real estate companies, which have been the subject of numerous HUD complaints, are potential targets for pattern and practices suits. Frank E. Schwelb, Chief, Housing and Credit Section, Civil Rights Division, Department of Justice, letter to Cynthia N. Graae, Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, Feb. 22, 1978 (hereafter cited as Schwelb letter).
[22] HUD–DOJ agreement.
[23] Ibid.
[24] Laura Spencer, Director, Fair Housing Enforcement, Office of Fair Housing and Equal Opportunity, HUD, telephone interview, Mar. 13, 1978.
[25] Ibid.
[26] Ibid.
[27] Henry A. Hubechman, Executive Assistant to the Secretary of Housing and Urban Development, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 17, 1978 (hereafter cited as Hubechman letter).

the defendant. This problem concerned the Fogelman Management Company—a firm that manages approximately 10,000 housing units in Memphis, Tennessee. During the fall of 1974, 14 complaints of discrimination were filed with HUD against the Fogelman Management Company. Subsequently, HUD negotiated conciliation agreements between complainants and Fogelman. The agreements required the Fogelman Company to report to HUD every 30 days.[28]

Pursuant to this reporting requirement, HUD again found that Fogelman was discriminating. The applications for housing units of approximately 300 blacks were either rejected or steered to specific locations. HUD negotiated another conciliation agreement in which monetary compensation and free rent were part of the relief awarded to the rejected or steered minority applicants. DOJ stated:

> Prior to [DOJ's learning of discrimination by the Fogelman Management Company], HUD had already received and resolved a dozen or more complaints against Fogelman. Had we been advised. . .as the Memorandum of Understanding contemplated, then a suit to restrain the discriminatory practices might have been brought much earlier than it was. After the Department of Justice became involved, however, the two agencies worked together very well.[29]

The Department of Housing and Urban Development wrote to this Commission:

> DOJ knew of the complaints and conciliation agreements almost from the very beginning of HUD's involvement with Fogelman, and on several occasions, DOJ attorneys came to HUD and examined HUD's file thoroughly. . . .At the time of the early complaints, HUD indicated to DOJ that it would complete its administrative process in accordance with the statute prior to referring its files to DOJ for the initiation of litigation. In regard to the DOJ suit against Fogelman, DOJ and HUD were able to document the discrimination conclusively through joint investigation and review of the reports which were required to be submitted by Fogelman in connection with the earlier conciliation agreements. A consent decree with Fogelman was negotiated jointly by. . .DOJ together with HUD. . .staff. . . .[30]

Finally, DOJ asserts that frequently initial attempts to converse with key staff in HUD's Office of Fair Housing and Equal Opportunity are not successful and information sometimes is received by DOJ "with difficulty."[31] DOJ indicates that the small size of HUD's staff may be a source of this problem.[32]

In October 1978, DOJ informed this Commission that steps were being taken to improve its coordination with HUD.

> On August 14, 1978, in order to promote our prompt access to HUD files in matters warranting action by this Department, we wrote to the Assistant Secretary suggesting that, instead of proceeding by formal referral as in the past, HUD permit Department of Justice attorneys to inspect on a regular basis cases in which conciliation has failed and cases of multiple complaints against the same respondent. . . .We have just received an encouraging reply from HUD.[33]

B. Agreement Among DOJ, HUD, and the Federal Financial Regulatory Agencies

An intergency agreement among HUD, the four financial regulatory agencies, and DOJ provides for the exchange of information about complaints involving discrimination in lending. The agreement, officially called "Memorandum of Understanding," was developed by the Interagency Fair Housing Task Force[34] and has been in effect since January 18,

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[28] The following information was to be reported: (1) the race of the person applying; (2) the date the person applied; (3) whether the person was accepted or rejected; (4) if the person was rejected, the reason for such rejection. U.S. v. Fogelman Management Corporation (DC, W.D., Tenn. 1975) No. C-76-45.

[29] Schwelb letter, p. 14. DOJ observed:

> Despite the lack of communication from HUD to which the draft refers, this case ultimately became probably the most effective fair housing suit ever. Under the consent decree negotiated by both agencies, more than 300 blacks were offered more than $150,000 in free rent, and, within a year or so, some 1800 black families had moved into previously white buildings. Frank E. Schwelb, Chief, Housing and Credit Section, memorandum to Drew S. Days, III, Assistant Attorney General, Civil Rights Division, Department of Justice, "Draft Civil Rights Commission Chapter," Oct. 11, 1978, transmitted to this Commission in Drew S. Days, letter to Cynthia N. Graae, Assistant Staff Director for Federal Evaluation, U.S. Commission on Civil Rights, Oct. 12, 1978 (hereafter cited as Schwelb memorandum).

[30] Hubachman letter.

[31] Frank E. Schwelb, Chief, Housing Section, Civil Rights Division, Department of Justice, interview, Jan. 30, 1978.

[32] Ibid.

[33] Schwelb memorandum.

[34] The four regulatory agencies, i.e., the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Federal Home Loan Bank Board, are members of the Interagency Fair Housing Task Force along with HUD and DOJ. This task force was

1977.[35]

The Memorandum of Understanding commits the four financial regulatory agencies to the following:

- providing HUD with a copy of all complaints pertaining to discrimination in financing, together with an indication of action taken or contemplated by the agency on the complaint;
- providing HUD with a periodic report of the status of complaints referred by HUD to the regulatory agencies; and
- at the discretion of the regulatory agencies, referring appropriate cases to the Department of Justice.[36]

In addition, under the Memorandum of Understanding, HUD agrees to the following:

- Providing the appropriate Federal financial regulatory agency with a copy of all complaints received for investigation that pertain to discrimination in financing.
- Providing a copy of the notice to resolve, or not to resolve[37] served on the respondent to the appropriate Federal financial regulatory agency.
- Providing the appropriate Federal financial regulatory agency a copy of HUD's notification to DOJ when HUD's attempts to conciliate a complaint have failed and HUD determines that the matter should be referred to DOJ for appropriate action.[38]

Finally, under the memorandum, DOJ agrees to the following:

- Referring cases reflecting discrimination in lending to the appropriate Federal financial regulatory agency, at DOJ's discretion.
- Notifying the regulatory agencies when it has decided to institute suit against a financial institution.
- Providing HUD with a monthly list of financing investigations.[39]

DOJ has undertaken action to fulfill its part of the agreement by referring matters to the Federal Home Loan Bank Board (FHLBB) for administrative resolution. DOJ continues to monitor FHLBB's progress in dealing with the complaints.[40] In addition, DOJ has received good cooperation from FHLBB in investigating a number of complaints initially filed with DOJ against savings and loan institutions.[41] However, as of January 1978, not all of the agencies had properly administered their responsibilities pursuant to the memorandum. For example, through late 1977, the regulatory agencies were not providing HUD with the complaint reports called for in the memorandum.[42] The Comptroller of the Currency does note that "Our records indicate that the [Comptroller of the Currency] has been forwarding copies of fair housing complaints to HUD since that time."[43] However, HUD had not provided the regulatory agencies with copies of all complaints pertaining to discrimination in financing. It had failed to provide to the regulatory agencies, on a continuing basis, copies of the notifications to DOJ when HUD's attempts to conciliate failed. The Department of Housing and Urban Development has stated:

> The discussion of the agreement between DOJ, HUD and the Federal Financial Regulatory Agencies is essentially accurate as of the time the Commission staff gathered the information. Since that time, however, HUD has taken steps to assure that the HUD Regional Offices comply with their obligation to furnish copies of complaints of discrimination in financing to the regulatory agencies. The Department also plans to institute a better system of notification to DOJ when HUD attempts to conciliate such

established as a result of a request made by the Assistant Attorney General for Civil Rights prior to March 1976 hearings by the Senate Housing, Banking and Urban Affairs Committee on regulatory agency enforcement of Title VIII. The primary purpose of the task force is for the agencies to exchange information on examination techniques and training methods in the area of fair housing. The task force was also to draft guidelines for joint investigative procedures, "Interagency Fair Housing Task Force," Lucy Griffin, FHLBB *Journal*, April 1977 (hereafter cited as "Interagency Fair Housing Task Force").

[35] Memorandum of Understanding Regarding Interchange of Information Concerning Complaints Involving Discrimination in Financing, January 1977 (hereafter cited as Memorandum of Understanding Concerning Discrimination in Financing).

[36] Ibid.

[37] Title VIII requires the Secretary, within 30 days of receipt of a complaint, to investigate the matter and give written notice to the complainant of HUD's intention to resolve the complaint. If the Secretary decides not to resolve the complaint, it is usually because HUD lacks jurisdiction or the evidence failed to substantiate the complaint. 42 U.S.C. § 3610(c) (1970).

[38] Memorandum of Understanding Concerning Discrimination in Financing.

[39] Ibid.

[40] Walter Gorman, Deputy Chief, Housing Section, Civil Rights Division, Department of Justice, telephone interview, Mar. 16, 1978.

[41] Ibid.

[42] Janet Hart, Director; Jerauld C. Kluckman, Associate Director; Neil Butler, Associate Director; Al Sibert, Review Examiner; and Anne Geary, Chief, Equal Credit Opportunity Section, Consumer Affairs Division, FRB, interview, Oct. 26, 1977; and John Shockey, Chief Counsel; Thomas P. Vartanian, Staff Attorney; and Roberta Boylan, Assistant Director, Legal Advisory Services Division; Thomas W. Taylor, Associate Deputy Comptroller for Consumer Affairs and Electronic Funds Transfer System; and James T. Keefe, Special Assistant to the Comptroller, COC, interview, Nov. 3, 1977.

[43] Thomas W. Taylor, Associate Deputy Comptroller, Office of the Comptroller of the Currency, letter to Louis Nunez, Acting Staff Director, U.S. Commission on Civil Rights, Aug. 18, 1978.

complaints fail. . . .The Assistant Secretary for Fair Housing and Equal Opportunity has maintained a close working relationship with all Federal financial regulatory agencies and assisted them in developing relevant fair housing related policies and regulations.[44]

C. Government-Wide Sharing of Information

Because of overlap among Federal agencies' fair housing responsibilities, frequently more than one agency has responsibility for ensuring compliance with fair housing requirements by a single member of the real estate industry. These agencies would benefit from interagency sharing of information on names of participants in each agency's housing programs, the identity of parties under investigation, the results of such investigations, and the compliance actions taken. Government-wide sharing of such information could be used to:

- prevent duplicative reviews and investigations;
- ensure that parties found in violation of Title VIII by one Federal agency were not allowed to continue that violation in their participation in other Federal agency programs; and
- assist HUD in securing compliance with Title VIII. If Federal agencies that can use sanctions such as debarment and fund termination were alerted when HUD was conducting negotiations with their program participants, the possibility that such sanction might be taken could provide HUD with leverage to secure compliance.

There is, however, no Government-wide system for sharing fair housing information and very little information sharing between individual agencies. For example, although the Department of Defense (DOD) regularly refers its substantiated cases to HUD and DOJ,[45] the reverse is not true. DOD does not regularly receive lists of complaints being processed by other agencies or lists of housing facilities that HUD and DOJ have found to be in noncompliance with fair housing law. VA does not regularly share information on the housing discrimination complaints it receives nor does it receive such information from other agencies. FmHA does not regularly receive fair housing information from other Federal agencies. Indeed, it does not coordinate its fair housing efforts with any Federal agencies other than HUD. FmHA stated:

> In matters relating to fair housing, the only Federal agency with which the Farmers Home Administration coordinates fair housing matters is the Department of Housing and Urban Development. USDA and DHUD have an unwritten agreement of understanding that fair housing complaints received by HUD against FmHA employees will be forwarded to USDA for investigation and resolution. DHUD is provided the results of any such investigations upon request. Complaints made against FmHA housing loan recipients, particularly multi-unit housing loan recipients, are provided to DHUD in resolving the matter. Too, the FmHA Equal Opportunity Officer has participated in DHUD conciliation efforts with FmHA borrowers.[46]

IV. Federal Equal Housing Opportunity Council

As the Federal agency assigned responsibility for the overall administration of Title VIII of the Civil Rights Act of 1968,[47] HUD has a major duty to provide guidance and coordinate the efforts of the many other Federal agencies with fair housing responsibilities under Title VIII. Section 808(d) of the Civil Rights Act of 1968 requires all Federal agencies to administer their programs and activities relating to housing and urban development affirmatively to further fair housing.[48] It also requires all Federal agencies to cooperate with HUD.[49]

HUD's major activity under Section 808(d) has been to establish and lead the Federal Equal Housing Opportunity Council. The Council, composed of 52 executive and legislative branch agencies, provides the only point of interagency coordination on fair housing matters for most executive departments and agencies. Its quarterly meetings provide the only Government-wide opportunity for Federal agencies to keep abreast of each other's fair housing activities and to work together on specific fair housing matters, such as determining what fair

[44] Hubachman letter.

[45] Complaints of discrimination are forwarded to HUD and DOJ only at the complainant's request. DOD housing referral offices actively encourage all complainants whose complaints have been substantiated to file their complaints with HUD. There is very little followup by the military once a complaint has been referred. The complaint and investigation report is to be forwarded to HUD and DOJ within 180 days of the legal discriminatory incident. DOD Instruction 1100.16.

[46] Gordon Cavanaugh, Administrator, Farmers Home Administration, Department of Agriculture, response to Commission on Civil Rights questionnaire, Dec. 12, 1977. The Office of Equal Opportunity in USDA, however, reports that it coordinates its fair housing responsibilities with the Department of Justice and the Federal Trade Commission. Richard J. Peer, Chief, Compliance and Enforcement Division, Office of Equal Opportunity, Department of Agriculture, response to Commission on Civil Rights questionnaire, Dec. 12, 1977.

[47] 42 U.S.C. § 3608(a) (1970).

[48] 42 U.S.C. § 3608(d) (1970).

[49] *Id.*

housing issues the agencies should bring before the White House.[50]

In light of the fact that interagency coordination of fair housing policies and procedures has generally been poor, there is broad scope for Council involvement. It could work to bring uniformity to the major requirements that Federal agencies place upon the real estate industry. It could facilitate the sharing of information among Federal agencies about their investigations, reviews, and enforcement actions. It could help initiate joint investigations by agencies with fair housing responsibilities and foster joint policy decisions concerning the meaning of Title VIII and what constitutes fair housing. HUD has stated:

> The Department agrees with the statement expressed in the draft report that the Federal Equal Housing Opportunity Council has a tremendous potential for being one of the most influential bodies in the Federal Government relative to fair housing.[51]

However, the Council has not been an effective mechanism for providing direction to and coordinating the activities of member agencies. Although the Council's broad purpose is to assist agencies to further fair housing goals, it has acknowledged only three narrow objectives:

- to locate Federal facilities where there is an adequate amount of low- and moderate-income housing on a nondiscriminatory basis;
- to establish equal housing locator services in Federal agency headquarters and field installations; and
- to use Federal agency funding affirmatively to further the purposes of Title VIII.[52]

The Council has not adopted such objectives as:

- Establishing comprehensive and uniform policies as to what constitutes housing discrimination.
- Developing systems for information sharing.
- Designing affirmative fair housing programs for recipients of Federal assistance.
- Identifying Federal agency fair housing responsibilities.
- Coordinating Federal agency planning for fair housing budgets to ensure rational allocation of resources Government-wide.

Moreover, the Council's activities have been even narrower than its goals. The Council's basic activity has been to encourage its members to sign an "Interagency Fair Housing Agreement" that outlines an approach toward meeting the Council's goals, including the goal to use agency funding affirmatively to further the purposes of Title VIII. HUD has stated that "the Department has always maintained that the most productive goal set forth in the Interagency Fair Housing Agreement is the one calling for the use of agency funding authority to further fair housing goals."[53] However, the agreement focuses primarily on housing for Federal employees and prospective employees. As of July 1978, only 8 of the 52 member agencies had signed the fair housing agreement.[54]

The agreement has serious weaknesses. For example, it does not give adequate recognition to the need for assuring fair housing for Federal employees of all income levels.[55] Agencies signing the agreement must commit themselves to plan Federal facilities "where there is shown to exist an adequate supply of low- and moderate-income housing on a nondiscriminatory basis. . . ."[56] When agency relocation is proposed, the interagency agreement states that the Secretary of Housing and Urban Development will "investigate, determine and report to the relocating agency on the availability of low- and moderate-income housing in areas proposed for location of a federally-constructed building or leased space." The Secretary also agrees to advise the relocating agencies on actions that would increase

[50] For a discussion of the Council's activities, see U.S., Department of Housing and Urban Development, *The Federal Government, Fair Housing 1976* (hereafter cited as *The Federal Government, Fair Housing 1976).*

[51] Hubachman letter.

[52] These agencies were (in the order of the date the agreement was signed): Department of Commerce, Jan. 30, 1975; Department of Labor, Apr. 4, 1976; Consumer Product Safety Commission, July 13, 1976; Department of Agriculture, July 23, 1976; Department of the Treasury, Oct. 27, 1976; Department of Justice, Dec. 1, 1976; National Aeronautics and Space Administration, Jan. 11, 1977; and Civil Service Commission, June 15, 1978. Deborah Seabron, Council Liaison, Office of Voluntary Compliance, HUD, telephone interview, July 17, 1978 (hereafter cited as Seabron telephone interview).

[53] Hubachman letter.

[54] Seabron telephone interview.

[55] In contrast, a memorandum of understanding between HUD and the General Services Administration, upon which the proposed interagency agreement is based, requires that in the location and relocation of Federal agency facilities, both low- and moderate-income housing and fair housing objectives be pursued. Memorandum of Understanding between the Department of Housing and Urban Development and the General Services Administration Concerning Low- and Moderate-Income Housing, signed by Robert L. Kunzig, Administrator, GSA, June 11, 1971, and George Romney, Secretary, HUD, June 12, 1971. 36 Fed. Reg. 22,873 (Dec. 1, 1971). This memorandum is discussed in detail in the chapter on the General Services Administration.

[56] Carla A. Hills, Secretary of Housing and Urban Development, and James H. Blair, Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, letter and attachment to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Jan. 15, 1976.

the availability of low- and moderate-income housing once a site has been selected.[57] Although HUD is the major agency with responsibilities for administering Title VIII, it does not agree to investigate the extent of housing that is available on a nondiscriminatory basis in the vicinity of proposed Federal facilities. Further, HUD does not agree to advise the agency what actions to take if nondiscriminatory housing is unavailable.

Emphasizing the objective of fair housing separately from the objective of an adequate supply of low- and moderate-income housing is appropriate. Federal employees and prospective employees of all income levels may have difficulty in obtaining housing because they are excluded from housing on the ground of race, sex, national origin, or religion.

Another deficiency in the interagency agreement concerns its provision that the Memorandum of Understanding between HUD and GSA shall be incorporated in the final article of the agreement. This provision binds the signatories to cooperate with HUD and GSA in achieving the goals of the memorandum. However, the memorandum needs revision.[58] Although sex discrimination in housing is a serious problem and is prohibited by law, the memorandum does not provide for assuring that there is no discrimination against women in the financing, sale, or rental of housing in communities in which Federal agencies decide to locate.

Through the Council, some member agencies have called upon HUD for assistance on how to implement the goal of using Federal funding affirmatively to further the purposes of Title VIII. HUD and EPA, for example, have met several times over the last few years to determine how the EPA waste water treatment facility grants process can be tied into fair housing. The Department of Labor has requested an outline of how its programs fit into fair housing.[59] Nonetheless, the Council has not reached any agreement. There is no Government-wide agreement to direct funding to communities that have made efforts to provide low-income housing and to ensure that such housing is geographically dispersed.[60] There is no agreement to direct funding to communities that have eliminated discriminatory zoning practices or taken affirmative steps to eliminate discrimination in the sale and rental of housing. HUD observed:

> It is clear that a thorough evaluation of the goals of other agencies as they might affect fair housing is appropriate. Greater interagency cooperation is essential in identifying affected program areas, and in developing agency positions on the granting of funds to communities that have discriminatory housing practices.[61]

Moreover, the Council has established no mechanisms for interagency sharing of investigative findings or data collection. In the absence of a Government-wide system, Federal agencies such as DOD and VA were unaware that some participants in their programs have been found to have violated housing discrimination laws by other Federal agencies.[62] Therefore, the agencies allow these participants to continue in their programs with no corrective action or even an investigation.

The Council has not attempted to seek interagency solutions to Government-wide problems, such as:

- The lack of data on the activities of the various segments of the real estate industry. Federal agencies with fair housing responsibilities could combine their efforts to design a data collection and analysis system with maximum utility for all of them.
- The lack of enforcement power for HUD under Title VIII. Although HUD lacks enforcement power, many other Federal agencies have the ability to impose sanctions against noncomplying members of the real estate industry. For example, the Federal financial regulatory agencies can impose sanctions against banks and savings and loan institutions. VA can impose sanctions against certain brokers. With closer cooperation, Federal agencies could exert greater influence over people and institutions who have failed to comply with Title VIII.

The Council could have worked to strengthen equal lending activities of the Federal financial regulatory agencies and other agencies such as VA and FmHA that do business with lenders. In the absence of HUD-sponsored activity in this regard, although HUD has a leadership duty under Title

[57] Ibid.
[58] See chapter on the General Services Administration for a discussion of other weaknesses in the memorandum.
[59] Deborah Seabron, Council Liaison, Office of Voluntary Compliance, HUD, interview, Dec. 10, 1977 (hereafter cited as Seabron interview).
[60] The impact upon the exclusion of low-income housing is discussed in the chapter on the Department of Housing and Urban Development.
[61] Hubachman letter.
[62] See chapters on those agencies.

VIII, the Department of Justhas taken the primary role in coordinating Federal equal mortgage lending activities.[65]

The Council requests each agency member to submit biannual reports on its fair housing accomplishments. This reporting offers an opportunity for components within an individual agency to be informed of its own fair housing performance and to strengthen internal coordination. The individual agency reports are then reflected in the Council's annual report, which summarizes fair housing efforts in the Federal Government for a calendar year. However, as of early 1978, the most recent Council report concerned 1976 accomplishments.[66]

To some extent, HUD's failure to issue a more up-to-date report may have resulted from lack of full cooperation from member agencies. HUD finds that not all member agencies have been responsive in meeting their Council obligations. Agencies have been slow in meeting reporting requirements, and a number of their reports were poor. Some agencies did not even submit formal reports; some failed to include important achievements in their reports, such as the promulgation of fair housing regulations, making it difficult for HUD to prepare the annual interagency reports.[67]

HUD commented, "[M]ember agencies need to improve participation on the Council by attending Council meetings, providing requested reports in a timely fashion, and advancing ideas that can contribute to the success of the Council's mission."[68] HUD hopes to remedy this problem by evaluating agency performance. It wrote to this Commission:

> In 1975 and 1976, HUD used a rating system to provide a simple measure of how agencies have performed relative to the Council goals. This system appeared to be an effective tool in getting the agencies to work toward improved performance and thus, a 100 percent rating. Although no ratings were given in 1977, every effort has been made to ensure that ratings will be given in 1978.[69]

Perhaps the Council's most serious problem is that it has been accorded low priority within HUD. Although HUD's Assistant Secretary for Equal Opportunity and Fair Housing has provided some financial support when requested, the Council continues to be plagued by inadequate staffing and budget. Moreover, there has been little coordination between the HUD office responsible for the Council and other offices under the Assistant Secretary for Equal Opportunity and Fair Housing.[70]

The Council's work for the most part is handled by one staff member from HUD's Office of Voluntary Compliance. This person spends, on the average, approximately 90 percent of her time performing the day to day work of the Council. The Director of the Office of Voluntary Compliance devotes, on the average, approximately 2 hours every 3 months to the Council. The understaffing has severely limited HUD's ability to provide technical assistance to Council members. As a result, many requests are not met in a timely fashion or are inadequately addressed.[71]

As of August 1978, HUD was considering several suggestions for the improvement of its interagency coordination function.[72] HUD's Office of Voluntary Compliance developed an internal proposal to expand the Council into a division within the Office of Voluntary Compliance.[73] HUD noted that, in addition, "A temporary staff member, as part of a team, was given the special assignment to prepare a proposal for the Urban Regional Policy Group on how federal efforts should be coordinated to eliminate housing discrimination and residential segregation."[74]

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[65] See testimony before hearings held by the Senate Committee on Banking, Housing, and Urban Affairs, Oversight on Equal Opportunity in Lending Enforcement by the Bank Regulatory Agencies, Mar. 11–12, 1976, for DOJ's and HUD's contrasting roles with regard to their relationship with the Federal financial regulatory agencies. See also "Interagency Fair Housing Task Force."

[66] *The Federal Government, Fair Housing 1976.*

[67] Seabron interview.

[68] Hubschman letter.

[69] Ibid.

[70] Seabron interview.

[71] Ibid.

[72] Hubschman letter.

[73] Seabron interview.

[74] Hubschman letter.

FINDINGS AND CONCLUSIONS

This Commission concludes that the Federal Government's fair housing enforcement effort suffers from three principal interrelated deficiencies:

- Title VIII of the Civil Rights Act of 1968, the primary Federal fair housing law, does not provide effective enforcement mechanisms for ensuring fair housing.
- Those Federal departments and agencies charged with ensuring equal housing opportunity have not adequately carried out this duty.
- The Government's appropriations in support of fair housing have been inadequate to meet the Nation's needs in this critical area of civil rights enforcement.

I. Major Shortcomings of Title VIII

A. Title VIII does not authorize the Secretary of Housing and Urban Development (HUD) to initiate investigations absent complaints, even if the Secretary has reason to believe that the law has been violated. Thus, HUD is forced to rely exclusively on individual complaints in attempting to effectuate that title.

B. Title VIII makes no provision for third parties to file fair housing complaints on behalf of other aggrieved persons, making it difficult for individuals or organizations who are aware of Title VIII violations but not themselves victims of those violations to set Federal Title VIII enforcement efforts in motion.

C. Title VIII does not provide HUD with enforcement authority. Inasmuch as the Secretary of Housing and Urban Development is merely empowered to seek redress of Title VIII violations through conciliation and the Department of Justice (DOJ) has limited resources for Title VIII litigation, violators of Title VIII are likely to escape enforcement action. This fact curtails the incentive of the private housing industry to correct Title VIII fair housing violations voluntarily.

D. Title VIII makes no provision for the regular collection and reporting of data by those subject to its prohibitions, although such data would improve the Federal ability to conduct systemic investigations into compliance with the law by members of the housing industry.

E. Title VIII does not explicitly authorize the use of "testers" to investigate possible fair housing violations. Testing involves comparing the experiences with the same broker, builder, or lender of a majority group and a minority group representative, who purport to have identical characteristics, such as income and family size, and to have identical preferences for housing. If the treatment received by the minority group member differs from that afforded the majority group member, the existence of housing discrimination can often be established. Without specific authorization to do so, both HUD and the Department of Justice have been reluctant to use Federal resources in this manner.

F. Title VIII's litigation provision (Section 813) is too narrow. Title VIII provides litigation authority to the Department of Justice only where the Attorney General has reason to believe that the respondent has engaged in a "pattern or practice" of discrimination or a "group of persons" have been denied equal housing opportunity and such denial raises an issue of general public importance. The Department of Justice has no authority to file suit where discrimination against an individual victim raises questions of public importance but does not establish a "pattern or practice." There is also no specific authority granted to DOJ to intervene in private litigation.

G. Title VIII restricts the awarding of attorneys' fees in private litigation to those plaintiffs who are "not financially able to assume said attorneys' fees." This restriction has a chilling effect on potential private litigants, whether they seek to secure their rights for their own sake or for the general public welfare.

II. Failure of Federal Agencies to Carry Out Their Fair Housing Responsibilities

A. For more than a decade the Departments of Housing and Urban Development and Justice, which have the primary roles in administering and enforcing Title VIII of the Civil Rights Act of 1968, have largely failed in their responsibilities to prevent and eliminate discrimination and segregation in housing.

1. Ten years after the passage of the 1968 act, neither agency has yet devised a satisfactory strategy for combating housing discrimination. Their programs are largely complaint oriented and ad hoc, despite the fact that few victims of housing discrimination file complaints or are even aware that their rights have been violated.

2. In the past few years, HUD has conducted no communitywide pattern and practice reviews, although, as this Commission observed in 1974, conducting a substantial number of such reviews is essential for meaningful Title VIII enforcement.

3. HUD has a small program for voluntary compliance, but its voluntary agreements have often contained commitments for less than the law requires and HUD has not regularly monitored compliance with the agreements.

4. In the 10 years since the passage of the Fair Housing Act, the Department of Justice has initiated only slightly more than 300 suits, the vast majority of which have been settled by consent decree. Most of these suits have involved apartment rentals, and the Department of Justice has been active in some important areas such as sex and national origin discrimination and exclusionary zoning.

5. At both the Departments of Housing and Urban Development and Justice, the staffing and organizational structure for fair housing reveal that neither of the two agencies has given sufficient importance to their Title VIII programs.

a. The Department of Justice has considerably reduced the number of staff assigned exclusively to fair housing in order to assume new duties under the Equal Credit Opportunity Act.

b. Although Title VIII gives the Department of Housing and Urban Development the authority to create an Assistant Secretary position, that position has not been used primarily for the administration of Title VIII. Rather, HUD's Assistant Secretary for Fair Housing and Equal Opportunity has been delegated myriad duties in addition to Title VIII, including contract compliance and equal opportunity in Federal employment.

c. The Assistant Secretary has no direct authority to supervise the activities of HUD field staff responsible for the investigation and attempted resolution of Title VIII complaints. Instead, these staff report to officials who spend the majority of their time on the implementation of HUD programs.

d. At both DOJ and HUD, when a conflict has occurred between administration of Federal programs and fair housing enforcement, fair housing staff have sometimes been effectively excluded from the decisionmaking process.

6. Neither agency has isssued comprehensive regulations on what constitutes discrimination under Title VIII.

7. HUD has failed to be forceful in requiring its program participants to practice fair housing and thus has not set a strong example for other Federal agencies to follow. This is an especially significant shortcoming, since Title VIII assigns HUD a Federal leadership role in the affirmative administration of housing and urban development programs to further the purposes of Title VIII.

8. HUD has not been given the necessary assistance and has not been organized to exercise its Title VIII leadership role effectively; HUD's principal activity with regard to this role has been to establish and administer an interagency fair housing coordination mechanism, the Federal Equal Housing Opportunity Council. However, the Council has been given low priority at HUD and has focused primarily on the narrow goal of equal housing for Federal employees. It has not attempted to seek interagency solutions to such problems as exclusionary zoning, discrimination in mortgage finance, lack of data on the extent of discrimination by the real estate industry, or the need for interagency sharing of compliance information.

B. In the absence of a strong example of enforcement and substantive guidance from HUD and the Department of Justice, other Federal agencies with fair housing responsibilities have also been ineffective in carrying out their duties.

1. The four Federal financial regulatory agencies—the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the

Currency, and the Federal Home Loan Bank Board—which together regulate the mortgage lending activities of most banks and savings and loan associations, have independent capacity to enforce Title VIII using their own regulatory mechanisms. However, they have taken insufficient corrective action when Title VIII has been violated and have not satisfactorily monitored the remedial steps which lenders have promised.

2. The Veterans Administration, which guarantees veterans' mortgages and in some cases makes home loans directly to veterans, does not monitor compliance with the fair housing certificates it obtains from brokers, builders, and other program participants. Moreover, VA's complaint handling is poor, and there is considerable evidence that minorities applying for loans from VA do not receive as favorable treatment as nonminorities.

3. The Farmers Home Administration also does not have an adequate program of monitoring its program participants to determine compliance with fair housing requirements. Further, there is substantial independent evidence that a number of projects funded by the Farmers Home Administration, which provides loans and grants for rural development, are segregated by race.

4. The Department of Defense, which has quite thorough complaint processing procedures in connection with its program to ensure equal opportunity in off-base housing, does not have adequate provisions for correcting the Title VIII violations it uncovers. All housing operated by an agent found to be discriminating is placed off-limits to military personnel. This sanction is generally lifted only after 180 days, at which time the agent signs a new nondiscrimination assurance. There are no requirements that prior to the lifting of sanctions the agent must affirmatively market dwellings to both sexes and all racial and ethnic groups or that the services conduct a review of the agent's facilities to ensure that compliance with Title VIII has been achieved.

5. The General Services Administration is party to an agreement with the Department of Housing and Urban Development which requires the adoption of affirmative action plans to remedy inadequacies in the amount of low- and moderate-income housing and to eliminate discrimination in the sale and rental of housing in the vicinity of proposed Federal facilities. No such plans have been implemented, although there is considerable evidence that such plans have been necessary.

6. More than 50 other executive branch agencies have Title VIII responsibilities in connection with such duties as the adminstration of community development programs, provision for internal equal employment opportunity, oversight of mortgage lenders, or disposal of surplus property. In the absence of explicit HUD regulations pursuant to Section 808(d) of the Fair Housing Act, many of these agencies have not fully implemented, or in some cases even acknowledged, these fair housing responsibilities.

III. Inadequate Appropriations for Fair Housing Enforcement

A. In fiscal year 1974, the total combined Title VIII fair housing appropriation for HUD and the Department of Justice was $6.2 million. The projection for fiscal year 1979, notwithstanding the effect of inflation and the unceasing need for greater fair housing enforcement efforts, is still only $11.2 million for both agencies.

B. Without increased funds, HUD cannot adequately engage in such activities as conducting communitywide compliance reviews, monitoring compliance agreements, or establishing a viable program for interagency coordination of fair housing. Without additional funds, DOJ cannot increase its caseload sufficicently to convey to the public that pattern and practice violators of Title VIII will be prosecuted.

C. Notwithstanding this inadequate level of funding, however, neither agency has strenuously sought additional Title VIII resources.

D. Even when all other fair housing programs and agencies are included, the Federal fair housing budget is only $17.4 million. Comparing this figure with the more than $300 million which the Government currently spends on the enforcement of equal employment laws, it is clear that the Government has given a very low priority to the enforcement of fair housing programs.

RECOMMENDATIONS

We believe that it is of paramount importance that within the next year the President and Congress take action to achieve three goals critical to fair housing:

- The creation within the Department of Housing and Urban Development (HUD) of a separate Equal Housing Administration, whose sole responsibility would be enforcement of Title VIII, through the reassignment of the Assistant Secretary for Fair Housing and Equal Opportunity to the position of Equal Housing Administrator.
- The amendment of Title VIII so as to increase significantly the fair housing enforcement capability of the Federal Government.*
- The appropriation of sufficient funds for Title VIII enforcement to promote meaningful progress toward the national goal of equal opportunity in housing.

To achieve these goals we recommend the following specific steps.

I. Creation of an Equal Housing Administration Within HUD

A. To strengthen and centralize Title VIII policymaking and enforcement activity, the President should assist the Secretary of Housing and Urban Development in the discharge of Title VIII responsibilities by directing all appropriate Federal departments and agencies to cooperate with the Secretary in the enforcement of Title VIII. This directive would thus confirm the President's commitment to the existing Title VIII designation of the Secretary of Housing and Urban Development as the individual vested with authority and responsibility for overall administration of the act. Such a directive should also specifically:

1. Direct departments and agencies to conduct their compliance reviews and investigations involving fair housing in accord with standards and procedures established by the Secretary of Housing and Urban Development.
2. Direct Federal departments and agencies to furnish such reports and information as the Secretary may request.

B. The Secretary of Housing and Urban Development should establish within HUD an Equal Housing Administration and should designate the Assistant Secretary for Fair Housing and Equal Opportunity as the Administrator. The Equal Housing Administration should have its own field staff. The powers and duties that the Secretary should delegate to the Administrator include the following:

1. The Administrator should develop and issue comprehensive substantive regulations that detail what constitutes discrimination under Title VIII and provide guidance in such areas as redlining, appraisals, property insurance, the zoning practices of local governments that operate to exclude minorities, and the "effects test," which dictates that the impact of, not the motivation behind, a particular practice is to be the threshold consideration in determining whether that practice establishes a *prima facie* case of discrimination.
2. The Administrator should provide guidance and direction to other Federal agencies with fair housing responsibilities as to the action they should take to carry out these responsibilities more effectively. The Administrator should establish a mechanism for reviewing other agencies' compliance with Title VIII in their programs and activities relating to housing and urban development.
3. The Administrator should prepare an annual report for the Secretary of HUD for submission to the President. This report should document the status of all Federal Title VIII enforcement activity.

* As discussed in the body of this report, legislation to achieve many of these objectives is pending in Congress and has been supported by this Commission as well as the Departments of Justice and Housing and Urban Development.

4. Whenever there is a violation of Title VIII that cannot be remedied voluntarily, the Administrator, through the Secretary, should advise the President of any failure of a Federal agency to initiate appropriate enforcement proceedings, including the suspension from participation in any Federal housing program, the termination of any Federal grant, the removal of Federal insurance of financial institutions, and the revocation of any Federal license or other operating authority. The President should then take appropriate action to ensure the initiation of enforcement proceedings.

5. The Administrator should establish an interagency mechanism for such activities as the establishment of uniform fair housing requirements for program participants and regulatees and the creation of a Government-wide system for sharing information on the receipt of complaints, the conduct of compliance reviews, and the imposition of sanctions.

6. The Administrator should assume the Title VIII duties currently being performed by the Assistant Secretary for Fair Housing and Equal Opportunity, as well as any other Title VIII duties currently being carried out by HUD staff.

7. The Administrator should establish a program for the funding of State and local fair housing agencies to assist HUD in expediting complaint processing and in conducting pattern and practice compliance reviews.

8. The Equal Housing Administration, including its Administrator, should have no responsibility other than the administration of Title VIII. Currently, there is no unit of the Federal Government which has fair housing as its sole focus. By creating an Equal Housing Administration within HUD, with no duties other than the administration and enforcement of Title VIII, the Government would communicate to the public the priority and importance it gives to Title VIII enforcement. The Administrator and staff would be able to devote their attention to combating housing discrimination and developing strategies to bring about fair housing. The creation of an Equal Housing Administration would also provide autonomy for Title VIII enforcement. The Administrator would have direct authority over Title VIII staff, eliminating the conflict that sometimes arises when HUD program officials, responsible for providing financial support to the housing industry, are asked at the same time to supervise staff investigating industry violations of Title VIII.

C. The Equal Housing Administration should not assume the role of directly enforcing fair housing requirements that attach to the administration of federally-assisted programs and Government regulatory functions. These requirements, provided for by such laws as Title VI of the Civil Rights Act of 1964, the Housing and Community Development Act of 1974, and the Equal Credit Opportunity Act, should continue to be executed by the Federal agencies, including HUD, which administer the related program or regulatory functions. Equal opportunity is an important component of grantee and regulatee operations, and it is essential that the Government express its concern for equal opportunity performance in conjunction with concern for all other aspects of grantee and regulatee activity. Therefore, the creation of an Equal Housing Administration should not diminish the resources HUD allocates for ensuring equal opportunity in HUD programs or any of its other equal opportunity responsibilities. Specifically, those duties other than Title VIII which are currently assigned to the Assistant Secretary for Fair Housing and Equal Opportunity should be delegated to an equal opportunity division within the Office of the Secretary of Housing and Urban Development. Such a division should have its own staff and should be headed by a special assistant to the Secretary.

D. The Equal Housing Administration and the Department of Justice should design a plan which will enable the Department of Justice to rely, as much as possible, upon HUD for investigative activity and identification of potential litigation targets. This will, in effect, increase the Department of Justice's resources available for litigation. Such a plan should include:

1. A more systematic approach to identifying fair housing violators and targeting them for litigation. This approach should envision utilization of HUD Title VIII investigative resources. Specifically, the Department of Justice should make use of all available and potential fair housing data to be gathered by HUD and the results of testing by HUD investigative personnel.

2. An expanded fair housing caseload, which would include increased attention to cases other than apartment rentals.

II. Amendment of Title VIII to Increase Enforcement Capability

A. Section 810 of the Civil Rights Act of 1968 should be amended to provide HUD with the following powers:

1. Authority for the Secretary to initiate complaints where HUD has reason to believe Title VIII has been or is being violated but no complaint has been filed with HUD.
2. Authority to accept complaints from third party individuals or organizations on behalf of injured parties.
3. Authority to issue, after a hearing on the merits, cease and desist orders, reviewable in Federal courts of appeals according to the Administrative Procedure Act. Such authority should include the power to order all equitable relief, including affirmative action, goals and timetables, and such other remedial steps as are necessary for effectuation of the act.

B. Section 811 of the Civil Rights Act of 1968 should be amended to give HUD authority to require the regular collection and reporting of data and other information requisite to a determination as to whether those subject to the act's prohibitions are in compliance. This provision should be modeled after Section 709(c) of the Civil Rights Act of 1964, which grants the Equal Employment Opportunity Commission broad authority to require data collection and reporting.

C. Section 812 of the Civil Rights Act of 1968 should be amended to provide for the awarding of attorneys' fees to prevailing plaintiffs regardless of their economic status.

III. Increasing Fair Housing Resources

A. The President should direct the Secretary of Housing and Urban Development to calculate the cost of implementing a strengthened fair housing program as outlined in recommendations I and II above.

B. Recognizing that the amount arrived at in this manner would be far greater than the existing funds for fair housing enforcement, this Commission believes that it is essential for the President to recommend steps to Congress that will have the effect of making additional resources available for fair housing enforcement. It would be preferable to increase funding for HUD's Title VIII program by enlarging HUD's total budget with an amount sufficient to cover the cost of implementing a national fair housing program as outlined in I and II above.

If such a step proves infeasible, the President should submit an amended fiscal year 1980 budget for the Department of Housing and Urban Development which, in effect, would reallocate a very small amount of its program monies for an enlarged Title VIII fair housing program. While we recognize that there may be items in HUD's total budget which should not be reduced in order to finance HUD's strengthened Title VIII enforcement effort, HUD's Title VIII resources could be increased substantially from program monies that could appropriately be subject to such a procedure.

We are cognizant that HUD already provides some funds to enforce equal opportunity in its programs through such provisions as Title VI of the Civil Rights Act of 1964, the equal opportunity provision of the Housing and Community Development Act of 1974, and Executive Order No. 11063. However, those provisions can only have a limited impact on achieving fair housing throughout the Nation because they only apply to those members of the housing industry who participate in HUD programs.

The Commission is aware that even slight reductions in funding for HUD programs will have some impact on HUD's ability to provide housing for persons with low and moderate incomes, many of whom are minorities and women who head households. However, we are also aware that because of discrimination both in HUD-funded housing and in the private sector, minorities and women who head households are often denied equal housing opportunity. We believe that at this critical juncture in the history of fair housing enforcement HUD should make a major effort to ensure that all housing, including that assisted by its own programs, is available without discrimination on the basis of race, ethnic origin, or sex. Thus, it is our belief that any negative program impact upon minorities and women which might result from a slight reduction in HUD programs would be more than offset by the gains which would accrue to these groups and the Nation as a whole if HUD substantially increased its Title VIII effort.

HUD programs are directed toward the national goal, as articulated in the Housing Act of 1949, of ". . . the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation." The Commission believes that its recommendations for improving HUD's fair housing effort would facilitate that goal by expanding housing opportunities for those people who have been and continue to be denied a decent home and a suitable living environment because of unlawful discrimination.

ADDENDUM

The Federal Fair Housing Enforcement Effort

As the agency charged with responsibility for overall administration of Title VIII of the Civil Rights Act of 1968, the Department of Housing and Urban Development (HUD), is the Federal agency with the most important role in an effective Federal effort to combat housing discrimination. Thus, the findings and recommendations in this report, The Federal Fair Housing Enforcement Effort, emphasize HUD's fair housing program. In February 1979, this Commission shared a draft copy of the report's findings and recommendations with Secretary of Housing and Urban Development, Patricia Roberts Harris. In early March 1979, Secretary Harris sent a response to the Chairman of this Commission, Arthur S. Flemming, which makes clear that she plans to strengthen significantly HUD's Title VIII program. The Commission is pleased with Secretary Harris' response, which follows immediately as an addendum to this report.

THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

MAR - 2 1979

Dr. Arthur S. Flemming
Chairman
U. S. Commission on Civil Rights
1121 Vermont Avenue, N. W.
Washington, D. C. 20425

Dear Dr. Flemming:

I have reviewed the draft of the findings and recommendations of the U. S. Commission on Civil Rights. As we agreed, I am pleased to provide both my reactions to the Commission's draft update of the 1974 report and a summary description of major actions already planned or underway at HUD since the field work on your study was done.

I find myself in agreement with much of the report but somewhat at odds with its overall implications. My reaction is, in large part, based on the fact that the period of review to a major degree reflects the state of HUD's civil rights program as of January 1977 and so little of the results of our efforts since that time.

As accurately described in the Commission's 1974 report, HUD's Fair Housing and Equal Opportunity responsibilities received very little support from previous Administrations and were allowed to languish. The record is clear that little in the way of program advocacy, regulatory authority, financial or other resource support was given to HUD's civil rights programs.

Upon becoming Secretary of HUD, I determined to arrest this decline and begin the process of rebuilding the Fair Housing program. In so doing, I recognized many of the deficiencies your report cites and began the steps necessary to correct them. I believe the Department has made significant progress toward the goals we share, although the pace has not equalled my original hopes or expectations. Progress has been affected by the limited resources which have been available and by the fact that HUD is still only beginning to recover from the devastating effect of the 1973 moratorium, which impacted housing and community development programs across the board, as well as the fight against discrimination.

Taken together, the findings and deficiencies described in the report represent a glaring failure to give fair and equal housing the national priority and support promised by the Civil Rights Act of 1968. I can assure you personally that the Fair Housing and Equal Opportunity program is one of the most immediate priorities before me at HUD. I consider the steps necessary to accomplish a truly effective civil rights program in housing a personal commitment which I intend to pursue with all my energy and ability.

A key element of my comprehensive strategy to strengthen Title VIII enforcement is amendment of Title VIII to correct substantial enforcement deficiencies which severely impede HUD's ability to provide remedies for victims of discrimination. My efforts to achieve these legislative changes and other significant initiatives to improve Title VIII compliance and enforcement are described below.

- Cease and Desist Authority

  HUD staff has been working with the relevant committees of the Congress for almost two years to develop the necessary remedial legislation. Last year I testified in full support of the Edwards-Drinan Bill and similar measures which would have corrected current legal inadequacies which substantially restrict HUD's enforcement powers. In advance of the current session, my staff has worked closely with the House and Senate to develop legislation which would bring to fruition the promises of 1968--including cease and desist authority and the ability to secure injunctive relief. The President has stated this Administration's full support for this legislation in his State of the Union message.

- HUD's Fair Housing Leadership and Organization

  Key among the steps I have taken is the total reorganization of the leadership and structure of the Fair Housing function, both at Headquarters and in the field. I have selected new and effective leadership with the appointment of Sterling Tucker who is already at work developing a comprehensive and cohesive strategy for Fair Housing enforcement. Among his first steps was the reorganization of the central operation by the appointment of two new Deputy Assistant Secretaries--one to focus upon the management of the Fair Housing Program and the other on enforcement and compliance. As I see it, this structure achieves the objectives of the report, by providing leadership with a specific focus upon fair housing.

It should be noted that the Regional Administrators are presently accountable directly to the Assistant Secretary for Fair Housing and Equal Opportunity for FH&EO performance in their respective regions. I have recently re-emphasized this accountability to each Regional Administrator.

Additional organizational adjustments are underway to further reassert Headquarters control of field activities and assure that enforcement efforts are given appropriate priority under more effective management. This has occurred in two stages. First, last October I reorganized the entire Department's field structure. Regional Administrators were removed from day-to-day operations to enable them to focus better their management and oversight efforts upon their programmatic and broader responsibilities, including civil rights activities. As political appointees these administrators report directly to me and are accountable for Title VIII activities.

In a few months, a second phase of reorganization will reassert Central Office control of fair housing programs in the field by a strengthened and augmented field management and coordination function under the new Deputy Assistant Secretary.

Also included in this phase will be the creation of separate branches in the Regional Offices focusing upon Title VI/Section 109 compliance.

- Substantive Title VIII Regulations

Aside from amendment of the legislation itself, the promulgation of regulations under Title VIII is the single most important vehicle to put teeth into the law. After languishing for ten years, this effort is well underway. I am committed to completion of development of these regulations by the end of the summer. These regulations will define the acts which constitute discrimination, including sophisticated practices in redlining, broker conduct, financing, advertising and related areas. In addition, the regulations will re-establish HUD's primacy and leadership of Fair Housing enforcement in Government and provide a basis for renewed efforts by other agencies.

- New Rapid Response Complaint Processing

In January 1978, I launched a comprehensive attack upon HUD's current system for processing discrimination complaints. The first phase of this new program was to clean up the backlog of

over-age complaints. By the end of Fiscal Year 1978, we had reduced the number of such complaints from 817 to 48 while tightening our over-age definition from 120 to 90 days. Further, in Fiscal Year 1979, we reduced the number of days a complaint may remain open without being classified as over-age from 90 days to 60 days.

Phase two of this process was the establishment of an expert Task Force including representatives of HUD, EEOC, Department of Justice and the New York City Civil Rights Commission, to develop streamlined complaint processing procedures. The Task Force has recommended a new Rapid Response Complaint Processing System keyed to identification of complaints susceptible to early, informal conciliation prior to investigation and aimed at providing immediately the housing sought by the complainant.

Phase three of this program will implement the final recommendations of the Task Force, first in a few selected cities (FY 1979) and ultimately in all regions (FY 1980).

- Systemic Discrimination Units

Planning is underway to implement a focused attack upon patterns and practices of discrimination simultaneously with the implementation of the new rapid response complaint processing system. This initiative is intended to set in place specially trained units of attorneys and investigators who will focus solely upon cases where systemic discrimination appears to exist. These units will be set up on an experimental basis in many of the regions which will test the new complaint processing system.

In addition to their potential impact as a deterrent to a large-scale discrimination, these units will help to develop a comprehensive data base for sharing complaint information with state and local agencies, and provide the Department of Justice data and investigative techniques which will lead to effective legal action and will develop data which can form the basis of community-wide compliance reviews.

- Relationships With Other Agencies

Steps are already underway to strengthen relationships with other Federal agencies which carry Title VIII responsibility. HUD has a system to notify the appropriate financial regulatory agency of discrimination complaints against regulated institutions as well as to notify those agencies of the outcome of HUD investigations and conciliations. Furthermore, HUD recently met with the Federal Home Loan Bank Board (FHLBB) to discuss cooperative arrangements for

investigations of housing discrimination complaints against institutions under the FHLBB's jurisdiction. This effort will be followed by similar relationships with other Federal financial regulatory bodies.

Overall relationships and authorities will be further enhanced by the substantive Title VIII regulations cited earlier. By addressing discrimination in financing, we will strengthen the enforcement role of such agencies.

- Fair Housing Assistance Program

HUD recognizes the need to enlist state and local agencies, both public and private, to maximize the resources enlisted in the battle against discrimination in housing. Federal resources must be increased, but state and local resources must also be used more effectively. To accomplish the latter objective, HUD has proposed a new appropriation under Title VIII to provide funds for incentives to state fair housing agencies which process HUD-referred complaints. This new program would constitute the first utilization of federal funds to assist state and local governments in Title VIII enforcement. I have attached a copy of the complete budget justification for this program and only briefly summarize its features here.

The program will provide incentives to state and local agencies to process Title VIII referred complaints in a speedy and effective fashion. Only those states in which fair housing laws and procedures have been judged to be substantially equivalent to Title VIII are eligible. In addition, the program will provide support for new compatible data system development, new management systems, broad training programs, innovations in systemic discrimination programs, rapid complaint processing systems, use of testing and alternative investigative techniques, new management systems and other strengthened enforcement techniques. When fully operational we expect this program to multiply tenfold the current state agency complaint processing capability.

- Local Private Fair Housing Groups

HUD has underway a demonstration project to determine the extent to which technical assistance will enable local private fair housing groups to undertake substantially increased responsibilities and activities in support of Title VIII. This demonstration involves the use of HUD research funds and matching contributions by entitlement communities. The

program will last two years and involves approximately 7-10 such groups selected by HUD with the assistance of the National Committee Against Discrimination in Housing (NCDH). NCDH will develop a manual of Title VIII strategies and techniques for such groups and provide training and assistance. HUD will then contract with those selected to provide monitoring services, complaint intake, testing and similar services. In addition, local groups will learn to develop data systems compatible with HUD's, to identify large scale discrimination, to educate the public, to combat steering, etc. Should this model be effective, HUD intends to seek funds in the 1981 Budget to support a broadened program involving such agencies and groups.

The actions I have outlined are a partial inventory of measures planned and underway to strengthen civil rights enforcement at HUD. They do not include the many measures we are taking to enforce Title VI of the Civil Rights Act of 1964 and Section 109 of the Housing and Community Development Act of 1974. Nor do they reflect the increased effectiveness of Fair Housing and Equal Opportunity programs when tied to viable housing and community development programs. The effectiveness of HUD's fair housing and equal opportunity incentives and disincentives depend in large part on whether there are attractive housing and community development programs available for HUD's clientele and beneficiaries. To cite a few examples:

- The affirmative fair housing marketing plan provisions developed under Title VIII are most effective if the Section 8 program is working to produce real starts at a high level.

- Tenant selection and assignment policies are of little avail if public housing management and operating subsidy programs leave those projects in poor condition. Further, without production of additional units, opportunities for those on tenant waiting lists will be severely diminished, no matter how effective an assignment and selection system we have.

- Large and small cities alike are feeling the pressure of intensified monitoring and compliance reviews of entitlement and grant applications. A significant number are experiencing sanctions such as declarations of ineligibility, reduced grant amounts, or the imposition of specific grant conditions.

- HUD's newest program, the Urban Development Action Grant program, has established as a condition of eligibility that applicants show demonstrated accomplishment in fair housing and equal employment opportunity.

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I appreciate the opportunity you provided to discuss the report with you prior to its publication. I hope this description of HUD initiatives provides sufficient information to allow us to work together to strengthen our fair housing enforcement efforts.

Sincerely yours.

Jay Janis for

Patricia Roberts Harris

Enclosure

GPO 930 951